(24,604)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 386.

WILLIAM E. HEIM, CRANFORD COMPANY, AND FLINN-O'ROURKE COMPANY, INC., PLAINTIFFS IN ERROR,

vs.

EDWARD E. McCALL, MILO R. MALTBIE, J. SARGEANT CRAM, GEORGE V. S. WILLIAMS, AND ROBERT C. WOOD, AS MEMBERS OF AND CONSTITUTING THE PUBLIC SERVICE COMMISSION FOR THE FIRST DISTRICT OF THE STATE OF NEW YORK.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

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a STATE OF NEW YORK:

Court of Appeals.

To the Justices of the Supreme Court of the United States:

The judges of the court of appeals of the State of New York, do hereby make answer and return to the writ of error issued herein to said court by attaching thereto a transcript of the record and judgment of this court, in the case of, William E. Heim vs. Edward E. McCall, Milo R. Maltby, J. Sergeant Cram, George V. S. Williams and Robert C. Wood, as members of and constituting the Public Service Commission for the First District of the State of New York, Cranford Company and Flinn-O'Rourke Company, Inc., together with all things touching the same, which we certify and return under the seal of our said court to the Supreme Court of the United States and the justices thereof, as we are herein commanded.

In witness whereof, I have hereunto set my hand and affixed the official seal of the court at the Capitol in the City of Albany, this fifth day of March, A. D. 1915.

[Seal Court of Appeals, State of New York.]

R. M. BARBER, *Clerk.*

b 18–318.

Filed Jan. 16, 1915.

Court of Appeals of the State of New York.

WILLIAM E. HEIM, Plaintiff-Respondent,
against
EDWARD E. MCCALL, MILO R. MALTBIE, J. SERGEANT CRAM, George V. S. Williams, and Robert C. Wood, as Members of and Constituting the Public Service Commission for the First District of the State of New York, Defendants-Appellants; Cranford Company and Flinn-O'Rourke Company, Inc., Defendants-Respondents.

Papers on Appeal from Order and Judgment Overruling Demurrer and Directing Judgment for Plaintiff.

George S. Coleman, Counsel to the Public Service Commission for the First District, Attorney for Defendants-Appellants, 154 Nassau Street, Borough of Manhattan, New York City.

Thomas F. Conway, Attorney for Plaintiff-Respondent, 32 Nassau Street, Borough of Manhattan, New York City.

Edward M. Grout and Paul Grout, Attorneys for Defendants-Respondents, 115 Broadway, Borough of Manhattan, New York City.

Filed Jan. 16, 1915.

Supreme Court, Appellate Division, First Department.

WILLIAM E. HEIM, Plaintiff-Appellant,
against
EDWARD E. McCALL, MILO R. MALTBIE, J. SERGEANT CRAM, George V. S. Williams, and Robert C. Wood, as Members of and Constituting the Public Service Commission for the First District of the State of New York; Cranford Company and Flinn-O'Rourke Company, Inc., Defendants-Respondents.

Statement under Rule XLI.

This action was commenced on the 28th day of November, 1914, by service of the summons and complaint on the defendants Edward E. McCall and others, as members of and constituting
2 the Public Service Commission for the First District of the State of New York. The amended complaint was served on December 4, 1914, to which the said defendants served a demurrer on December 4, 1914. The names of the original parties in full are as follows: William E. Heim, plaintiff; Edward E. McCall, Milo R. Maltbie, J. Sargeant Cram, George V. S. Williams and Robert C. Wood, as members of and constituting the Public Service Commission for the First District of the State of New York.

By order made and entered herein on the 4th day of December, 1914, on motion of Cranford Company and Flinn-O'Rourke Company, Inc., the said moving parties were made defendants herein. There has been no other change in the parties.

3 *Notice of Appeal of Plaintiff.*

Supreme Court, New York County.

WILLIAM E. HEIM, Plaintiff-Appellant,
against
EDWARD E. McCALL, MILO R. MALTBIE, J. SARGEANT CRAM, George V. S. Williams, and Robert C. Wood, as Members of and Constituting the Public Service Commission for the First District of the State of New York; Cranford Company and Flinn-O'Rourke Company, Inc., Defendants-Respondents.

SIRS: Please take notice, That the plaintiff hereby appeals to the Appellate Division of the Supreme Court in and for the First Judicial Department from the judgment entered herein December 12, 1914, sustaining the demurrer of the defendants Edward E. McCall and others, as members of and contituting the Public Service Commission for the First District of the State of New York, to the amended complaint herein and dismissing the said amended complaint, and the plaintiff hereby appeals from each and every
4 part thereof; and the plaintiff also appeals from, and intends to bring up for review upon said appeal, the order entered herein the 12th day of December, 1914, denying the plain-

tiff's motion for an injunction pendente lite herein, and each and every part of said order.

Dated December 12, 1914.

Yours, etc.,

THOMAS F. CONWAY,
Attorney for Plaintiff-Appellant.

32 Nassau Street, Borough of Manhattan, New York City.

To William F. Schneider, Esq., Clerk of the County of New York;

George S. Coleman, Esq., Attorney for Defendants-Respondents Edward E. McCall and others, as members of and constituting the Public Service Commission for the First District of the State of New York; and

Grout & Grout, Esqs., Attorneys for Defendants-Respondents Cranford Company and Flinn-O'Rourke Company, Inc.

4a *Notice of Appeal of Defendants Cranford Co. and Another.*

Supreme Court, New York County.

WILLIAM E. HEIM, Plaintiff,
against
EDWARD E. MCCALL, MILO R. MALTBIE, J. SERGEANT CRAM, GEORGE V. S. WILLIAMS, and Robert C. Wood, as Members of and Constituting the Public Service Commission for the First District of the State of New York; Cranford Company and Flinn-O'Rourke Company, Inc., Defendants.

Please take notice, that the defendants Cranford Company and Flinn-O'Rourke Company, Inc., hereby appeal to the Appellate Division of the Supreme Court, for the First Judicial Department, from an order denying plaintiff's motion for an injunction pendente lite, and from the decision and judgment sustaining the demurrer of the defendants Edward E. McCall, et al., as members of and constituting the Public Service Commission for the First Dis-
4b trict of the State of New York, all of which were entered in the office of the Clerk of the County of New York, on the 12th day of December, 1914, made by the Hon. Joseph E. Newburger, and from each and every part of said order, judgment and decision, as well as from the whole thereof.

Dated, New York, December 12th, 1914.

Yours, etc.,

EDWARD M. GROUT AND
PAUL GROUT,
Attorneys for Defendants, Cranford Company and Flinn-O'Rourke Company, Inc.

115 Broadway, Manhattan, New York City.

To Thomas F. Conway, Esq., Attorney for Plaintiff, 32 Nassau Street, New York City.

George S. Coleman, Esq., Attorney for Defendants, Edward E. McCall, et al., as members of and constituting the Public Service Commission, 154 Nassau Street, New York City.

William F. Schneider, Esq., County Clerk of New York County, County Court House, New York City.

5 *Judgment Appealed From.*

At a Special Term, Part I, Supreme Court of New York, held in and for the County of New York, in the County Court House, in said County, on the 12th Day of December, 1914.

Present: Hon. Joseph E. Newburger, Justice.

Index No. 32323—1914.

WILLIAM E. HEIM, Plaintiff,
against
EDWARD E. MCCALL, MILO R. MALTBIE, J. SERGEANT CRAM, GEORGE V. S. WILLIAMS, and Robert C. Wood, as Members of and Constituting the Public Service Commission for the First District of the State of New York; Cranford Company and Flinn-O'Rourke Company, Inc., Defendants.

Final Judgment.

The issue of law herein raised by the demurrer of the defendants, Edward E. McCall and others, as members of and constituting the Public Service Commission for the First District herein, to the complaint herein having come duly on for trial before Honorable
6 Joseph E. Newburger, one of the Justices of this Court, on December 4, 1914, at a Special Term for Motions of the Supreme Court, New York County, and said Justice having duly heard the parties, and after due deliberation having made and filed his decision in writing sustaining said demurrer and directing final judgment in favor of the said defendants herein sustaining their demurrer to the complaint and dismissing said complaint;

Now, on motion of George S. Coleman, counsel to the Public Service Commission for the First District, it is

Ordered, adjudged and decreed that the demurrer of the said defendants herein to the complaint herein be and the same hereby is sustained, and that the said complaint be and the same hereby is dismissed.

Enter.

J. E. N., *J. S. C.*

WM. F. SCHNEIDER, *Clerk.*

7 *Decision.*

Supreme Court of the State of New York, New York County.

Index No. 32323—1914.

WILLIAM E. HEIM, Plaintiff,
against
EDWARD E. MCCALL, MILO R. MALTBIE, J. SERGEANT CRAM, GEORGE V. S. WILLIAMS, and ROBERT C. WOOD, as Members of and Constituting the Public Service Commission for the First District of the State of New York; Cranford Company and Flinn-O'Rourke Company, Inc., Defendants.

Decision.

The issue of law arising upon the demurrer of Edward E. McCall and others, as members of and constituting the Public Service Commission for the First District of the State of New York, defendants herein, having come duly on before me for trial at a Special Term for Motions of this Court on December 4, 1914,

Now, after hearing George S. Coleman for the defendants,
8 Edward E. McCall and others as members of and constituting the Public Service Commission for the First District of the State of New York, and Jeremiah A. O'Leary for John Gill, amicus curiæ, in support of the demurrer, and Thomas F. Conway for the plaintiff herein, and Edward M. Grout for the Cranford Company and Flinn-O'Rourke Company, Inc., defendants herein, in opposition thereto, and due deliberation having been had thereon, I decide and find as follows:

Conclusion of Law.

That said complaint upon the face thereof does not state facts sufficient to constitute a cause of action.

It is therefore ordered that the defendants, Edward E. McCall, Milo R. Maltbie, J. Sergeant Cram, George V. S. Williams and Robert C. Wood, as members of and constituting the Public Service Commission for the First District of the State of New York, have final judgment in their favor sustaining the demurrer to the complaint and dismissing said complaint.

JOSEPH E. NEWBURGER,
Justice of the Supreme Court.

9 *Order Appealed From.*

At a Special Term, Part 1, Supreme Court of New York, held in and for the County of New York, in the County Court House, in said County, on the 12th day of December, 1914.

Present: Hon. Joseph E. Newburger, Justice.

Index No. 32323—1914.

WILLIAM E. HEIM, Plaintiff,
against
EDWARD E. MCCALL, MILO R. MALTBIE, J. SARGEANT CRAM, GEORGE V. S. Williams, and Robert C. Wood, as Members of and Constituting the Public Service Commission for the First District of the State of New York; Cranford Company and Flinn-O'Rourke Company, Inc., Defendants.

Order Denying Motion for Injunction Pendente Lite, with Stay.

Upon the order to show cause granted herein by Honorable Vernon M. Davis, a Justice of the Supreme Court of the State of New York, on the 25th day of November, 1914, the affidavit of service thereof verified by Thomas E. O'Brien on the 28th
10 day of November, 1914, summons and the amended complaint and exhibits verified the 27th day of November, 1914, supported by the affidavit of Ernest C. Moore sworn to the 25th day of November, 1914, the demurrer filed December 3, 1914, the affidavit of the plaintiff sworn to November 27, 1914, the affidavit of John S. Russell sworn to November 28, 1914, and two affidavits of Thomas E. O'Brien sworn to November 27, 1914, in support of the motion, and the affidavits submitted in opposition thereto by Jeremiah A. O'Leary for John Gill, amicus curiæ, to wit, the affidavit of John Gill, sworn to the 3rd day of December, 1914, the supplemental affidavit of John Gill sworn to the 4th day of December, 1914, the affidavit of Roswell D. Tompkins sworn to the 3rd day of December, 1914, the affidavit of Thomas A. Lyons sworn to the 4th day of December, 1914, and the affidavit of Robert R. Dutcher sworn to the 3rd day of December, 1914,

And this matter having duly come on for hearing and having been duly heard before me, a Justice of the Supreme Court, on the 4th day of December, 1914, and after hearing Thomas F. Conway, in support of the application, and Edward M. Grout appearing for the defendants, Cranford Company and Flinn-O'Rourke Company, Inc., in support thereof, and George S. Coleman and Jeremiah A. O'Leary in opposition thereto, and due deliberation having been had, and upon filing the opinion of the Court.

Now therefore, on motion of George S. Coleman, Counsel to the Public Service Commission for the First District, it is
11 Ordered, that the temporary injunction hereinbefore granted be and hereby is vacated and that the application

herein for an injunction pendente lite be and hereby is denied with a stay, however, of all acts on the part of the said defendants constituting the Public Service Commission sought to be restrained herein pending the determination of an appeal to the Appellate Division herein if said appeal be taken within five days after service of a copy of this order.

Enter.

J. E. N., *J. S. C.*

Approved as to form.
Dated Dec. 11, 1914.
EDWARD M. GROUT AND
PAUL GROUT,
Attorneys for Cranford Co. and Flinn-O'Rourke Co.
THOMAS F. CONWAY,
Attorney for Plaintiff.

12 *Affidavit of Service; Read in Behalf of Plaintiff.*

Supreme Court, New York County.

WILLIAM E. HEIM, Plaintiff,
against
EDWARD E. MCCALL and Others, as Members of and Constituting the Public Service Commission for the First District of the State of New York, Defendants.

STATE OF NEW YORK,
County of New York, ss:

Thomas E. O'Brien, being duly sworn, says:

I. I am of the age of twenty-one years and upwards.

II. On the 28th day of November, 1914, at 11:45 o'clock a. m., at the office of the Public Service Commission, 154 Nassau street, Borough of Manhattan, the City of New York, I made service of the annexed injunction order, dated November 28, 1914, and signed by Hon. Vernon M. Davis, a Justice of the Supreme Court of the State of New York, summons dated November 25, 1914, com-
13 plaint verified November 27, 1914, affidavit of plaintiff, William E. Heim, sworn to November 27, 1914, affidavit of Ernest C. Moore, sworn to November 25, 1914, two affidavits of Thomas E. O'Brien, sworn to November 27, 1914, the affidavit of John S. Russell, sworn to November 28, 1914, and a copy of the original bond and undertaking, approved by said justice and filed on November 28, 1914, on the Public Service Commission for the First District of the State of New York, by delivering to Milo R. Maltbie, acting chairman of said Public Service Commission, personally, and leaving with him, true copies of the said originals thereof and exhibiting to him the signature of the judge on the annexed original injunction order, and informing him that the order so served was an injunction order.

III. At the time of making service as above stated, I knew said Milto R. Maltibie to be the acting chairman of said Public Service Commission, and as a member of said Commission, a defendant herein.

THOMAS E. O'BRIEN.

Sworn to before me this 28th day of November, 1914.
NELLIE M. FAILEY,
Notary Public, New York County, #1052.

14 *Order to Show Cause; Read in Behalf of the Plaintiff.*

Supreme Court, New York County.

WILLIAM E. HEIM, Plaintiff,
against
EDWARD E. MCCALL, MILO R. MALTBIE, J. SARGEANT CRAM, GEORGE V. S. WILLIAMS, and ROBERT C. WOOD, as Members of and Constituting the Public Service Commission for the First District of the State of New York; Cranford Company and Flinn-O'Rourke Company, Inc., Defendants.

Injunction Order.

It appearing to my satisfaction by the complaint, verified the 27th day of November, 1914, supported by the affidavit of Ernest C. Moore, sworn to the 25th day of November, 1914, the affidavit of the plaintiff, sworn to November 27, 1914, the affidavit of John S. Russell, sworn to November 28, 1914, and two affidavits of Thomas E. O'Brien, sworn to November 27, 1914, that the plaintiff demands and is entitled to a judgment against the defendants restraining the commission of the acts hereinafter enjoined, upon the ground
15 that the proposed declaration of forfeiture of the construction contracts to which The City of New York is a party, in said complaint and Exhibit "A," thereto attached, mentioned, which said declaration of forfeiture is hereinafter enjoined, would be an illegal official act, and a waste of the public funds of The City of New York, and an injury to the plaintiff as a taxpayer of said City, and that the consummation of said declaration of forfeiture during the pendency of this action would produce injury to the plaintiff;

And it appearing by said complaint and affidavits that the defendants threaten, or are about to declare said forfeiture, in violation of plaintiff's rights, which act would render the judgment herein ineffectual, and the plaintiff having given the bond and undertaking as required by law;

Now, on motion of Thomas F. Conway, attorney for the plaintiff, it is

Ordered, That the defendants Edward E. McCall, Milo R. Maltbie, J. Sargeant Cram, George V. S. Williams and Robert C. Wood, as members of, and constituting the Public Service Commission for the

First District of the State of New York, and each of them, and their and each of their deputies, agents, attorneys and servants, are hereby enjoined and restrained, until the further order of the Court, from signing, executing or otherwise effecting a declaration of the forfeiture of the subway route construction contracts in said complaint and Schedule "A," thereto annexed, mentioned, to which the City of New York or the said Public Service Commission, acting for and in behalf of the said City of New York, is a party, or any of said construction contracts, because of the past or present employ-
16 ment of laborers thereon who are not citizens of the State of New York nor of the United States;

And let the defendants show cause, at a Special Term, Part I of this Court, to be held at the Court House in the City and County of New York on the 1st day of December, 1914, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, why this injunction should not be continued until the trial of this action, and why the defendants, as members of, and constituting the Public Service Commission for the First District of the State of New York, should not be restrained and enjoined, until the trial of this action, from refusing to continue the practice of preparing and certifying vouchers for ninety per cent. of the amounts stated in the said Commission's Chief Engineer's monthly estimates heretofore made and certified to the said Commission, and the amounts to be stated in the monthly estimates hereafter to be made and certified to the said Commission, to be the value of the work done and materials furnished by the respective contractors under said contracts.

It is further ordered, That service of this order and of the complaint and affidavits thereto annexed, on November 28, 1914, shall be sufficient service and notice, and plaintiff is hereby given leave to serve such other and further affidavits and papers in support of his motion for an injunction as he may be advised, on or before November 30, 1914.

And, in view of the fact that the contracts referred to in the complaint and in Exhibit "A" thereto annexed are all matters of public record and are in the possession of the defendants, and of the further fact that their substance has been stated in said complaint and exhibit, it is

Further ordered, That copies of said contracts, or any of
17 them, need not be served as a part of the papers upon this motion, or as a part of the papers upon which this order is granted.

Dated, New York, November 25, 1914.

VERNON M. DAVIS,
Justice of the Supreme Court
of the State of New York.

Summons; Read in Behalf of Plaintiff.

Supreme Court.

Trial Desired in New York County.

WILLIAM E. HEIM, Plaintiff,
against
EDWARD E. McCALL, MILO R. MALTBIE, J. SARGEANT CRAM, GEORGE V. S. WILLIAMS, and Robert C. Wood, as Members of and Constituting the Public Service Commission for the First District of the State of New York; Cranford Company, and Flinn-O'Rourke Company, Inc., Defendants.

To the above-named defendants and each of them:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of
18 the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated, New York, Nov. 25, 1914.

THOMAS F. CONWAY,
Attorney for Plaintiff, Office and Post-office Address, 32 Nassau Street, Borough of Manhattan, the City of New York.

19 *Amended Complaint; Read in Behalf of Plaintiff.*

Supreme Court, New York County.

WILLIAM E. HEIM, Plaintiff,
against
EDWARD E. McCALL, MILO R. MALTBIE, J. SARGEANT CRAM, GEORGE V. S. WILLIAMS, and Robert C. Wood, as Members of and Constituting the Public Service Commission for the First District of the State of New York; Cranford Company, and Flinn-O'Rourke Company, Inc., Defendants.

The plaintiff above named, by Thomas F. Conway, his attorney, for an amended complaint against the defendants herein, alleges:

First. That the plaintiff is, and at all times hereinafter mentioned was, a citizen of the State of New York and a resident of The City of New York and a taxpayer of said city, whose assessment of taxes in each of the last several years past has amounted to a sum in excess of one thousand dollars, upon which assessments plaintiff has been liable to pay taxes, and has duly paid the taxes on said assessments within one year previous to the commencement of this action.

20 Upon Information and Belief.

Second. That the defendants McCall, Maltbie, Cram, Williams and Wood are, and for many months last past have been, the duly appointed, qualified and acting Public Service Commissioners for the First District of the State of New York, and have constituted and are the Public Service Commission of said district, hereinafter referred to as the Public Service Commission.

Third. That heretofore, and many years prior to the execution of the contracts hereinafter referred to, or any of them, the Board of Rapid Transit Railroad Commissioners in and for The City of New York, acting under and pursuant to Chapter IV of the Laws of 1891, entitled "An Act to provide for Rapid Transit Railways in Cities of over One Million Inhabitants," and various laws amending and supplementing the same, hereinafter referred to as the Rapid Transit Act, determined that a rapid transit railroad was necessary for the interest of the public and for The City of New York, and said Commissioners, in or about the year 1896, laid out and established a route for said railroad in said city, which was subsequently constructed, equipped and operated. That between said year 1896 and the year 1907, the said Board of Rapid Transit Railroad Commissioners laid out and established certain other routes or additions to the routes so laid out and established in or about the year 1896, which said routes or additions and each of them were subsequently constructed, equipped and operated.

Fourth. That said routes so laid out were located in the
21 Boroughs of Manhattan, The Bronx and Brooklyn in said city, and each and all of them were throughout the year 1912, and for a long time prior thereto had been, and continuously since have been leased from The City of New York and operated by the Interborough Rapid Transit Company, hereinafter referred to as the Interborough Company.

Fifth. That in the year 1912, and for a long time prior thereto, many railroads had been owned and operated in the Borough of Brooklyn and the Borough of Queens by the Brooklyn Union Elevated Railroad Company, and since October, 1912, such railroads have been continuously operated by New York Consolidated Railroad Company which is hereinafter called the Brooklyn Company.

Sixth. That from time to time the Board of Rapid Transit Railroad Commissioners and its successor in office, the Public Service Commission, acting under and pursuant to the said Rapid Transit Act, and the acts amending and supplementing the same, determined that various rapid transit railroads in addition to the existing rapid transit railroad, referred to in Paragraph Third hereof, were necessary for the interest of the public and of The City of New York, and have determined and established such routes and the general plans of construction thereof. That these routes so laid out permitted of the following extensions and additions to existing rapid transit lines:

I. Interborough Lines.

(*a*) An extension of the west side line in the Borough of
22 Manhattan, south from Times Square to the Battery and thence under the East river to Borough Hall in the Borough of Brooklyn;

(*b*) An extension of the east side line in the Borough of Manhattan, north through Lexington avenue and under the Harlem river to the Borough of the Bronx;

(*c*) Three extensions connecting with the northerly end of the east side subway in the Borough of Manhattan, and running northerly practically to the city line;

(*d*) A new route through Forty-second street in the Borough of Manhattan to the East river and under that river by the so called "Steinway Tunnel," and thence by various branches into the Borough of Queens;

(*e*) Various extensions of the then existing subway in the Borough of Brooklyn to the east and south.

II. Brooklyn Lines.

(*a*) Additional rapid transit line from Brooklyn extending under Broadway and 59th Street to Queens.

(*b*) Additional rapid transit line extending under Fourth Avenue with branches to South Brooklyn and Coney Island.

(*c*) Additional rapid transit line extending from 14th Street and Sixth Avenue in Manhattan under the East River to and through the eastern district of Brooklyn.

Seventh. That the said Board and the said Public Service
23 Commission contemplated that such extensions and additions to the Interborough lines would form, and did form, in connection with the then existing subways, two complete routes through the Boroughs of Brooklyn and Manhattan, each terminating in the Borough of the Bronx, and a lateral line to the Borough of Queens, with feeding extensions reaching out by branches into the outlying districts of the Boroughs of the Bronx, Queens and Brooklyn, and that such extensions and additions to the Interborough lines would, with the existing Interborough and Brooklyn lines, form, and did form, a complete and comprehensive rapid transit system for the accommodation of the entire city and of the residents and taxpayers of the entire city.

Eighth. That throughout the said year 1912 and for a long time prior thereto, the Public Service Commission and the city authorities and the public in general deemed the construction and operation of additional rapid transit railroads made up of said routes, at the earliest possible date, as so laid out, an imperative necessity for the comfort and convenience of the public and the residents and taxpayers of The City of New York, and their construction and operation at the earliest possible date were then and continuously since have been, an imperative necessity for the comfort and convenience of said residents and taxpayers.

Ninth. That the estimated cost of constructing said new routes

and extensions was upwards of two hundred thirty-five million dollars ($235,000,000.00) and the estimated cost of equipping said new routes and extensions for operation was upwards of forty-four million dollars ($44,000,000.00). That The City of New York had no money available for a large part of the estimated cost of such construction or equipment, and could not borrow the necessary moneys for said large part of such construction or equipment without exceeding its legal and constitutional debt limit by many millions of dollars.

Tenth. That in order to utilize the existing rapid transit systems in conjunction with the new systems upon the basis of a five cent fare and as a part of such arrangement and to meet and overcome the difficulties and delays arising and likely to arise from lack of funds on the part of the City to construct and equip the said new routes, and to accomplish the early construction and operation of said rapid transit system on the best possible terms for the public, negotiations were entered into several years ago between the Public Service Commission and the City authorities on the one part, and the Interborough Company and the Brooklyn Company on the other part, with a view of formulating and entering into contracts between the City and the said companies respectively, or between the City and any corporation or corporations which might be formed by the said companies for the purpose of carrying out any agreement as to construction, equipment and operation that might be reached; whereby the said companies respectively would provide the funds or capital, in whole or in part, for the construction and equipment of the various new routes which the City was desirous of constructing, equipping and putting in operation; and as a result of such negotiations a form of contract was finally agreed upon, wherein and whereby the Interborough Company undertook and agreed with The City of New York to contribute toward the cost of construction of and to equip and to lease and operate certain portions of the said routes in conjunction with the existing system operated by it as more fully hereinafter set forth, which contract was duly signed, executed and delivered by the said Interborough Company on the one part and the Public Service Commission, acting for and in behalf of The City of New York, on the other part, on or about the 19th day of March, 1913. That as a result of said negotiations, another contract was entered into by and between the New York Municipal Railway Corportion, which corporation had in the meantime been formed in the interest of the Brooklyn Company, on the one part, and the Public Service Commission, acting for and in behalf of The City of New York, on the other part on the 19th day of March, 1913, wherein and whereby the said New York Municipal Railway Corporation undertook and agreed with The City of New York to contribute toward the cost of construction of and to equip and to lease and operate certain portions of the said routes in conjunction with the existing system operated by it as hereinafter more fully set forth, which contract was duly signed, executed and delivered.

Eleventh. The said contract of the City with the Interborough Company, among other things, provides:

(*a*) For the construction by the City of certain new routes in the Boroughs of Manhattan and the Bronx and under the East
26 river, at an estimated cost of approximately one hundred twelve million dollars ($112,000,000.00), of which approximately fifty-eight million dollars ($58,000,000.00) was to be contributed by the Interborough Company;

(*b*) For the equipment of said routes by the Interborough Company, at an estimated cost of twenty-two million dollars ($22,000,000.00) to be paid by the Interborough Company;

(*c*) For a lease of said new routes to the Interborough Company for a period of forty-nine years; and for the reduction of the term of the existing lease by the Interborough Company, so that the same would expire at the same time with the lease above mentioned, and containing a further provision for the recapture of the said routes and the right to operate the same at any time after ten years after the execution of the contract;

(*d*) For the operation of said routes by the Interborough Company in conjunction with the routes theretofore operated by that Company on a five-cent fare basis; that is, to entitle passengers to be carried over the entire system or route made up of the old or existing routes and the new routes with general transfer privileges, for a single five-cent fare;

(*e*) For the pooling of the receipts from such operation of
27 said old and new routes and the application of the said receipts for the following purposes in the order mentioned:

(1) Payment of operating expenses and other fixed charges, including a depreciation charge.

(2) Payment to the Interborough Company of six million three hundred thirty-five thousand dollars ($6,335,000.00) annually, being the estimated net yearly earnings of the old routes for the two fiscal years ending June 30, 1911.

(3) Payment to the Interborough Company of six per cent. on its contribution to the cost of construction and equipment of new routes;

(4) Payment to the City of 8.76 per cent. on its expenditures;

(5) Payment of the remainder to the City and Interborough Company in equal parts or shares.

Twelfth. The said contract between the City and the New York Municipal Railway Corporation provides, among other things:

(*a*) For the construction by the City of certain new routes in the Borough of Brooklyn and adjacent territory at an estimated cost of one hundred million dollars ($100,000,000.00) of which approximately thirteen million five hundred thousand dollars ($13,
28 500,000.00) was to be contributed by that Corporation;

(*b*) For the construction of extensions to existing railroads in the Borough of Brooklyn and adjacent territory which are not owned by the City, but which were owned by the Brooklyn Company and equipment of the same, and for general improvements in

said existing railroad at an estimated cost of twenty-six million dollars ($26,000,000.00), to be paid by that Corporation;

(c) For the equipment of said new routes at an estimated cost of twenty-four million dollars ($24,000,000.00), to be paid by that Corporation;

(d) For a lease of the new routes constructed by the City to the said Corporation for a period of years and for the recapture of the said routes and the right to operate the same at any time after ten years after the execution of the contract;

(e) For the operation of said new routes by the said Corporation in conjunction with the routes theretofore owned or operated by the Brooklyn Union Elevated Company and as extended or improved on a five-cent fare basis; that is to entitle passengers to be carried over the entire system or route made up of the old or existing routes and the new routes and extensions with general transfer privileges for a single five-cent fare;

29 (f) For the pooling of the receipts from such operation of said new and old routes and extensions and the application of said receipts for the following purposes in the order mentioned:

(1) Payment of operating expenses and other fixed charges, including a charge for depreciation and renewals;

(2) Payment to the New York Municipal Railway Corporation of three million five hundred thousand dollars ($3,500,000.00), the estimated average annual earnings of the existing routes to be operated with the new routes;

(3) Payment to the same Corporation of 6% upon its investment in new lines;

(4) Payment to the City of the interest and sinking fund charges on the bonds issued by it to defray the cost of construction of said new lines;

(5) Payment of the remainder to the City and the New York Municipal Railway Corporation in equal parts or shares.

Thirteenth. That said contracts are matters of public record; that they are filed in the office of the Public Service Commission, and reference is hereby made to them to more fully show their terms; that the same were also approved by the Board of Estimate and Apportionment and other proper authority before execution.

30 Fourteenth. That as parts of the above mentioned general scheme and plan for subways and elevated extensions and rapid transit in The City of New York, the Public Service Commission has let and awarded each of the contracts for construction of the portion of said new routes hereinafter referred to, and the Interborough Company is and became a party to many of them for the purpose stated in said contracts as follows: Solely for the purpose of paying out a part of its contribution towards the cost of construction of the said respective routes.

Fifteenth. That each and all of said new routes were duly submitted by the Public Service Commission to the Board of Estimate and Apportionment and the Mayor of The City of New York, as the local authorities having control of the streets and highways of the City, and were duly approved by said Board and by said Mayor.

That as to each and all of said routes the said Public Service Commission either obtained the consents of the owners of one-half in value of abutting property along the line of said routes or, failing to obtain such consents, made application to the Appellate Division of the Supreme Court in and for the judicial department in which said routes were located, pursuant to the provisions of said Rapid Transit Act, for the appointment of three commissioners to determine and report whether the said routes were to be constructed and operated in accordance with the general plan which had theretofore been adopted by the said Public Service Commission and approved by the said Board of Estimate and Apportionment and the said Mayor, and in each instance where the said consents had not
31 been obtained, commissioners were duly appointed by the said Appellate Division and, after hearings, reported to said court their determination that said routes should be constructed and operated in accordance with said plan, and said reports, and each of them, were, upon motion, duly confirmed by said court, and said routes and general plans so adopted by the Public Service Commission and so adopted and approved by the said Board of Estimate and Apportionment and the said Mayor, thereafter constituted, and now are the routes and general plans of the so-called Dual System of Rapid Transit Railroads herein referred to.

Sixteenth. That thereafter in the instance of each of said routes and in the instance of each part of said routes in this complaint referred to or described, the Public Service Commission, pursuant to the Rapid Transit Act and the acts amending and supplementing the same, proceeded to, and did prepare plans and specifications for the construction of the major portion of said routes, in accordance with the above mentioned general plans of construction; that the originals of said detailed plans and specifications are in the possession of defendants and are referred to by the plaintiff as a part of his complaint.

Seventeenth. That thereafter, and before awarding any contract or contracts for the construction of said routes, or any portion of the same, in accordance with the above mentioned general plans of construction, said Public Service Commission advertised for proposals for contracts covering the construction thereof by notice printed once a week for two successive weeks in not less than two
32 daily newspapers published in The City of New York; that the said advertisement was in the form of an invitation to contractors and in compliance with the provisions of the Rapid Transit Act and the acts amending and supplementing the same.

Eighteenth. That before adopting said forms of contract and the said plans and specifications which form part thereof, the said Public Service Commission duly set a date or dates for public hearings upon the proposed terms and conditions thereof, at which citizens were entitled to appear and be heard, and such hearings were thereafter duly held.

Nineteenth. That pursuant to said advertisement and said invitations to contractors, bids were duly made and submitted to the said Public Service Commission upon the major portion of the said

new routes and portions of the said new routes hereinafter referred to and more fully described in Schedule "A" hereto annexed, which is hereby made a part of this complaint. That the said contracts were duly awarded for the said respective routes to the lowest or successful bidder in each instance, the name of such bidder appearing in Schedule "A" hereto annexed, together with the amount of his bid and the route or portion of the route the construction of which was let and awarded to him, the date the contract was actually awarded to such bidder, and the time stipulated for performance. That in each instance where bids were submitted to and accepted by the Public Service Commission, the form of contract to be awarded said bidders was thereafter duly submitted by the said Public Service Commission to the Board of Estimate and Apportion-
33 ment, after being approved as to form by the Corporation Counsel, which said contracts, or forms of contracts, so submitted were in each instance in the same form as the contract filed in the office of the Public Service Commission prior to the said invitations to contractors to bid and on which bids were based. That in each instance the said Board of Estimate and Apportionment approved of the form of contract and of its execution and the delivery in each instance to respective bidders on the contract or contracts so awarded; that the Comptroller of The City of New York placed his endorsement thereon as required by law, showing that funds were available for the purpose of the contract.

Twentieth. That each of the contracts when executed and delivered to the contractors and for the routes described in said Schedule "A" contained and contains the following provision: "In obedience to the requirements of section fourteen of the Labor Law, it is further provided that if the provisions of said section fourteen are not complied with, this contract shall be void." That a provision in identical language is contained in the invitation to bidders. That the said requirement in said proposals and the said provision in each contract, are, and each of them is, unconstitutional, void and of no effect, in that they are in conflict with and in violation of section two of Article IV of the Constitution of the United States of America and of section one of Article XIV of the Amendments to said Constitution and of other sections and provisions of the said Constitution and the amendments thereto, and are in conflict with and in violation of the provisions of the Constitution of the
34 State of New York, and are in conflict with the treaty herein specified between the United States of America and the King of Italy and with the various other treaties entered into by the United States of America and several foreign countries, which contain what is called "The Most Favored Nation Clause"; in other words, provide that the citizens of such countries shall enjoy all the privileges, rights, and immunities which the citizens of countries most favored in any existing treaty with the United States enjoy.

Twenty-first. That each of said contractors named in Schedule "A" hereto annexed promptly and at or about the date of the execution and delivery of their contracts respectively, made the necessary

preparation and furnished the necessary plant for the performance of the work called for in and by the said contracts respectively, and in order to complete the same in the time specified in the said contracts, as more fully appears in regard to each contract as stated in the said Schedule "A." That all of the said contracts are in the process of performance at different stages, some of them being performed to the extent of more than seventy-five per cent. of the work called for and practically all of them being performed to a very large extent of the work called for; that in no instance is any of the said contractors in default.

Twenty-second. In the course of construction under the said contracts, each of the said contractors has constantly employed, and now employs, a large number of laborers and mechanics who
35 are residents of The City of New York, but who are not and never have been citizens of the United States or citizens of the State of New York, but who were born in Italy and are subjects of the King of Italy, and also employed laborers who, although citizens of the United States, were not citizens of the State of New York, and did not give preference to citizens of the State of New York over such laborers so employed who were not citizens of the State of New York, but were citizens of the United States.

Twenty-third. That at the time of the advertisement of said proposals and continuously thereafter it was, and has been known to be, and was, and has been and is necessary to employ large numbers of such subjects of the King of Italy and citizens of other States and of other countries to perform the work described in said contracts and to perform the contracts within the times therein respectively specified and at the sums or contract prices therein respectively stated and provided to be paid to the contractors, and in order to keep the cost of construction and equipment of the Dual system within the total amount provided and specified in the said contracts and plans formulated and entered into by and between the City and the said Interborough Company and the City and the said New York Municipal Railway Corporation.

Twenty-fourth. That in the year 1871 the United States of America and the King of Italy, entered into a treaty which then became and has since continuously been valid and effective, which, among other things, provides that subjects of the said King
36 of Italy, and his successors, residing in the United States shall have and enjoy the same rights and privileges in respect to person and property as are secured to the citizens of the United States residing in the United States, to which treaty reference is hereby made to more fully show its provisions.

Twenty-fifth. That at present and at no time since the letting of said contracts and each of them, has there been available or could there be obtained by said contractors, or any of them, a sufficient force or number of laborers, citizens of the United States or the State of New York, to do the work called for by the said contracts within the times respectively within which the said contracts were required to be performed, nor is there at present nor has there been at any of

the times herein mentioned, available or to be had a sufficient force and number of such laborers to perform the work necessary to construct and complete the Dual system of rapid transit herein described within any reasonable time or within the time contemplated or provided by the said plans and contracts between the said City and the said Interborough Company and between the said City and the said New York Municipal Railway Corporation.

Twenty-sixth. That from the time the said contractors respectively entered into the said contracts until a few days since, no questions were raised by any one in regard to the right of said contractors to employ alien laborers to perform the said work when necessary; that when they did so they believed they were not violating any law, as they regarded the provisions of the law and of the
37 contract in form prohibiting the same as in fact null and void; that the various contracts with the various contractors mentioned in the said Schedule "A" were substantially identical in form and substance, except in regard to prices and description of the work, routes and names; that all of said contracts contain provisions for doing the work on the basis of unit prices specified in them, where the work was of a character susceptible of classification to make the unit prices applicable, and where it was not susceptible of such classification, the work should be paid for on the basis of actual cost plus a percentage of ten per cent. to cover superintendence and profits, as a reference to the same will more fully show, and also contained, among other provisions, provisions to the following effect:

"Article XXVIII. In order to assist the Contractor to prosecute the work advantageously, the Engineer shall, from time to time, as the work progresses, but not oftener than once a month, make in writing an estimate, such as in his opinion shall be just and fair, of the amount and value of the work done and materials incorporated in the work by the Contractor according to the terms of this contract (but it is understood that in making such estimates the Engineer shall not necessarily be governed by the unit prices contained in the contractor's proposal), provided, however, that estimates may at any time be withheld or reduced, if, in the opinion of the Engineer, the work is not proceeding in accordance with the contract. The first such estimate shall be of the amount and value of the work done and materials incorporated in the work
38 since the Contractor commenced the performance of this contract on his part. Every subsequent estimate except the final estimate shall be of the amount and value of the work done and materials incorporated in the work since the last preceding estimate was made, provided, however, that no such estimate shall be required to be made when, in the judgment of the Engineer, the total value of the work done and materials incorporated in the work since the last preceding estimate amounts to less than ten thousand dollars ($10,000.00). The Engineer shall further include accepted structural iron and steel delivered on the site of the work, but not incorporated in the work, at the rate of forty ($40) dollars per ton

of two thousand pounds. But the quantity of such structural iron and steel included in any partial estimate shall not exceed the quantity of such material, as determined by the Engineer, required for the ensuing six months, and any material included in a partial estimate which may subsequently become unsatisfactory shall be deducted from succeeding partial estimates. No materials not incorporated in the work, excepting such structural iron and steel, and none of the Contractor's plant shall be included in partial estimates.

Article XXIX. Such estimates shall not be required to be made by strict measurement, but they may be made by measurement or by estimation, or partly by one method and partly by the other, and it shall be sufficient if they are approximate only.

39 Article XXX. Upon each such estimate being made and certified in writing to the Commission, the Commission shall forthwith prepare and certify a voucher for ninety per cent. of the amount stated in such estimate or certificate to be the value of the work done and materials furnished, and the City shall, within thirty (30) days after the date of the certification of such voucher by the Commission, pay the same; provided, however, that the City may at all times reserve and retain from said partial payments, or any of them, in addition to the ten per cent. above mentioned to be retained and reserved, any sum or all sums which by the terms hereof, or of any law of the State of New York passed prior to the date hereof, it is or may be authorized to reserve or retain."

That the Engineer mentioned in the said provision is the Chief Engineer of the Public Service Commission. That from the time of the letting of the said contracts such estimates were made and certified in writing to the Commission, and the Commission forthwith prepared and certified vouchers for eighty-five or ninety per cent. of the amounts stated in such estimates or certificates and each of them to be the value of the work done and materials furnished, and the City within thirty days after the date of certification of such vouchers, and each of them, by the Commission paid the same, which payments were necessary to enable the contractors to continue the prosecution of the work under their respective contracts.

Twenty-seventh. That recently and within the past ten
40 days, complaint has been made to the defendants, the Public Service Commission, by certain citizens of the City that some of the said contractors were employing large numbers of alien laborers, to wit, large numbers of citizens of the Kingdom of Italy, and that thereby they had violated their contracts and the statute mentioned, and the said citizens requested the said Public Service Commission and the members thereof to declare each and all the said contracts void and forfeited by reason of the employment of the said aliens by the said contractors, and the said Public Service Commission and the members thereof have threatened and declared their intention in the event of violations of Section 14 of the Labor Law being proved to declare each and all of said contracts mentioned herein and in Exhibit "A" hereto attached void and to refuse to ap-

prove further monthly estimates of amounts payable to contractors for work done, thus depriving said contractors of the means of continuing the prosecution of the said work and the right to perform the same. That as a matter of fact they have already refused to approve certain monthly estimates duly made and certified to them in writing by the said Engineer, amounting to One hundred eight thousand eight hundred fifty-six 34/100 dollars ($108,856.34) for work done during the month of October, 1914, by two of the contractors referred to in Schedule "A," or to prepare and certify vouchers for eighty-five or ninety per cent. of the amount stated in said estimates and, unless said defendants are restrained and enjoined from doing so, they are about to, and will declare all of said contracts void and terminate the same and refuse to approve of further monthly
41 estimates solely because of the claim that said provision of the said Labor Law is being violated by the said contractors in the respect mentioned.

Twenty-eighth. That the termination of the said contracts would result in irreparable loss and damage and waste of money to the City and to the residents and to the tax payers thereof including the plaintiff, and will be wholly illegal and improper. That the loss and damage and waste will consist, among other things, of the delay in completion of the rapid transit, or so called subway system, which is and has been urgently needed for the benefit and convenience of the public. That the work called for to be done under the existing contracts cannot be, and will not be done, in the event that the defendants terminate their contracts, until new contracts are advertised, awarded and let for the work which will have been left undone, which will prevent the completion of the Dual system for many years after the time provided for the completion of the work in and by the contracts mentioned and now being performed and beyond the time contemplated and provided for the completion of the Dual system. That the cost to the public and to The City of New York will be enormously increased, because the supply of labor will be so far diminished that the cost of the same will be greatly enhanced, and the said diminution of labor available will also result in insufficient numbers of laborers being employed on the said several contracts and necessarily greatly protract the work under the said contracts and the completion of the same.

42 Twenty-ninth. That the City will be involved in litigation which will be brought by the various contractors to recover anticipated profits against the City because of the improper and illegal termination of their contracts, and the City will have no defense to the actions so brought, and will be compelled to submit to a mere assessment of damages, which in all probability are likely to be enormous, and will also cause great expense to the City because of the multiplicity of suits and other proceedings which will be brought against it by contractors whose contracts have been terminated.

Thirtieth. That the City and public will be further damaged and great loss, waste and injury be brought upon them because of the fact that a large percentage of capital and money necessary for the con-

struction of the said subway system, in the performance of the said contracts, is being supplied as above set forth by third parties under contract to the City to supply the same, which contracts were based and conditioned upon an estimate made in advance by the City and its authorities and the Public Service Commission of the amount which it would cost to build and complete the said subway system and to connect the parts now under construction pursuant to said contracts with other portions of the same heretofore constructed and now in operation and other portions of the same hereafter to be constructed, and said contracts may be invalidated and the purpose for which they were made defeated.

Thirty-first. That in and by the said contracts between the said City and the said third parties supplying the said capital, the
43 total capital agreed to be provided for the completion of the said system is upwards of two hundred fifty million dollars ($250,000,000.00), of which the said third parties have agreed to supply upwards of the sum of one hundred fifteen million dollars ($115,000,000.00) and the City has agreed to supply the balance.

Thirty-second. That if said contracts, entered into with the various contractors mentioned for construction work, are forfeited and declared void and new ones advertised for and let, the capital provided for as aforesaid for the completion of the said system, will be wholly inadequate and the said system cannot be completed or the said work done, and the money already supplied by the City and the said third parties will have been wasted.

Thirty-third. That the said third parties will, in consequence of said action by said defendants in terminating the said contracts, have various and large claims for damages against the City.

Thirty-fourth. That the contracts between the City and the said third parties, namely, the Interborough Company and the New York Municipal Railway Corporation as well as the other contracts between the City and the contractors in Exhibit "A," hereto attached mentioned which are in the possession of the defendants and to which the plaintiff hereby refers as a part of this complaint, more fully show the situation, the rights of the parties to the contracts, the rights of the public under the contracts and the liability and loss and waste that would come to the City in case the various con-
44 tracts entered into to carry out the plan of rapid transit called for and contemplated by the said City and said third parties in entering into the said agreements for the supplying of said capital, are declared forfeited.

Thirty-fifth. That the plaintiff has no adequate remedy at law.

Thirty-sixth. That prior to the commencement of this action, the plaintiff duly furnished the bond to the defendants herein, approved by a justice of this court, conditioned as prescribed in section fifty-one of the General Municipal Law, and such bond was duly filed in the office of the Clerk of the County of New York.

Thirty-seventh. That The City of New York is a domestic municipal corporation; that the Interborough Rapid Transit Company is a domestic railroad corporation; that the New York Municipal Rail-

way Corporation is a domestic railroad corporation. That the contractors named in Exhibit "A" hereto annexed, except Alfred P. Roth, William Bradley, Thomas B. Bryson, G. M. Gest, Herbert W. Lockwood and J. H. Burton, are each and all and, at the time of the letting of the respective contracts to which they are parties, were corporations, either duly organized and existing under the Laws of the State of New York or corporations duly organized and existing under the laws of a state other than the State of New York, and duly authorized to do business in the State of New York, and more particularly to enter into the contracts mentioned in said Exhibit "A" and to carry on and complete the same.

45 Wherefore, plaintiff demands judgment against the said defendants, and each and all of them, their deputies, clerks, agents, attorneys and assistants;

(1) Restraining and enjoining them, and each and all of them from declaring any of the said contracts mentioned in the complaint and Schedule "A" thereto attached void or forfeited because of the employment of laborers who are not citizens of the United States and who are not citizens of the State of New York as specified in the complaint;

(2) Restraining and enjoining the Public Service Commission, and the members thereof, from refusing and omitting to prepare and certify vouchers for eighty-five or ninety per cent. of the amount stated in the monthly estimates made and certified in writing to the said Commission by its Chief Engineer for work done under said contracts in accordance with the practice heretofore followed as above set forth and as provided for in the contract;

(3) And for such other and further relief as may be proper, together with the costs and disbursements of this action and a preliminary injunction pending the same.

THOMAS F. CONWAY,
Attorney for Plaintiff.

Office and Post-Office Address, 32 Nassau Street, Borough of Manhattan, New York City.

46 STATE OF NEW YORK,
County of New York, ss:

Thomas F. Conway, being duly sworn, says:

I. I am the attorney for the plaintiff herein.

II. I have read the foregoing amended complaint and know the contents thereof and the same is true of my own knowledge except as to the matters therein stated to be alleged upon information and belief and as to those matters I believe it to be true.

III. The sources of my information and the grounds for my belief as to all matters in said amended complaint stated to be alleged upon information and belief, are information furnished by the plaintiff, an examination made by me of copies or abstracts of the various contracts in said amended complaint referred to, conversations held

with the Chairman of the Public Service Commission for the First District of the State of New York and with the counsel and assistant counsel of said Public Service Commission, and newspaper articles which I have read and which were published contemporaneously, or practically contemporaneously, with the happening of the events in said amended complaint set forth.

IV. The reasons why this verification is not made by the plaintiff are that the plaintiff, as I am informed and believe, is confined to his house by illness, and there is need of immediate service of this amended complaint.

THOMAS F. CONWAY.

Sworn to before me this 4th day of December, 1914.

NELLIE M. FAILEY,
Notary Public, New York County.

EXHIBIT A.

Interborough Lines.

Routes Nos. 43 & 26—Diagonal Station Connection.

Sec.	Contractor.	Limits.	Contract delivered.	Time for completion (months).	Amount of bid.	Per cent of value of work completed Nov. 1, '14.
1.	Rapid Transit Subway Construction Co.	Connection between existing subway and Lexington Avenue and Steinway Lines.	.....	28	$3,097,312.50	
		Route No. 5—Lexington Avenue Subway.				
7.	Rapid Transit Subway Construction Co.	Lexington Ave., 43d to 53d St.....	July 16, 1914	31	$1,915,164.50	2
8.	Bradley Contracting Co.....	Lexington Ave., 53d to 67th St.....	July 21, 1911	40	3,369,484.20	80
9.	Patrick McGovern & Comp'y.....	Lexington Ave., 67th to 79th St.....	Feb. 13, 1912	40	1,961,997.00	93
10.	Bradley Contracting Co.....	Lexington Ave., 79th to 93d St.....	July 21, 1911	40	3,253,072.80	95
11.	Bradley Contracting Co.....	Lexington Ave., 93d to 106th St.....	July 21, 1911	40	3,132,195.05	95
12.	Oscar Daniels Company.....	Lexington Ave., 106th to 118th St....	Sept. 3, 1911	40	2,825,740.74	90.6
13.	Assigned to McMullen, Snare & Triest, Inc.	Lexington Ave., 118th to 129th St....	Nov. 17, 1911	40	4,071,416.50	90.6

EXHIBIT A—(Continued).

Sec.	Contractor.	Limits.	Contract delivered.	Time for completion (months).	Amount of bid.	Per cent of value of work completed Nov. 1, '14.
14.	Arthur McMullen & Hoff Company.	Lexington Ave. & 129th St., Manhattan, to 135th St., The Bronx.	July 23, 1912	40	3,889,775.05	79
15.	Assigned to Rodgers & Hagerty, Inc.	Mott & Gerard Aves., 13th to 157th St.	Nov. 17, 1911	40	3,820,129.75	98.4
		Route No. 16—Jerome Avenue Extension.				
1.	Oscar Daniels Company.....	Jerome Ave., 157th to 182d St.....	Dec. 31, 1913	18	1,077,978.00	18.1
2.	Cooper & Evans Company.....	Jerome Ave., 182d St. to Woodlawn Rd.	Apr. 3, 1914	18	1,076,831.00	16.5
		Routes Nos. 19 & 22—Southern Boulevard & Westchester Avenue Extension.				
1.	Richard Carvel Co., Inc.....	138th St. & Southern Boulevard, Alexander Ave. to 147th St.	Oct. 22, 1912	40	$2,253,281.75	39
1-A.	Rodgers & Hagerty, Inc.....	Southern Boulevard and Whitlock Ave., 147th St. to Bancroft St.	Dec. 31, 1913	30	2,253,159.25	19.9

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Route No. 18—White Plains Road Extension.

Sec.	Contractor.	Limits.	Contract delivered.	Time for completion (months).	Amount of bid.	Per cent of value of work completed Nov. 1, '14.
1.	Oscar Daniels Company.....	Bronx Park East to White Plains Road and Burke Street.	Mar. 24, 1914	18	914,400.25	6.5
2.	Alfred P. Roth.....	White Plains Road, Burke Street to 241st Street.	Dec. 31, 1913	18	958,484.00	28.8

Routes Nos. 4 & 38—Seventh Avenue-Lexington Avenue Subway.

1-A.	Rapid Transit Subway Construction Co.	South Ferry to Battery Pl. and Greenwich Street.	Aug. 13, 1914	31	474,244.00	5
1.	Rapid Transit Subway Construction Co.	Greenwich St., Battery Pl. to Vesey St.	June 19, 1914	33	2,121,077.25	3
2.	Degnon Contracting Co.....	West Broadway, Vesey to Beach St...	Mar. 9, 1914	36	3,059,522.00	8
3.	Degnon Contracting Co.....	Varick St. & 7th Ave. Ext., Beach to Commerce Street.	Dec. 31, 1913	36	2,185,063.50	37
4.	U. S. Realty & Imp. Co.....	Seventh Ave., Commerce to 16th Street.	Apr. 15, 1914	36	1,837,726.50	16
5.	U. S. Realty & Imp. Co.....	Seventh Ave., 16th to 30th Street.....	Dec. 31, 1913	36	2,401,306.75	24
6.	Rapid Transit Subway Construction Co.	Seventh Ave., 30th to 43d Street.....	Feb. 11, 1914	36	2,292,943.50	18
6-A.	Holbrook, Cabot & Rollins Corporation.	Seventh Ave., 43d to 45th Street.....	Aug. 6, 1914	33	421,566.00	18

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EXHIBIT A—(Continued).

Route No. 48—Park Place, William and Clark Street Subway.

Sec.	Contractor.	Limits.	Contract delivered.	Time for completion (months).	Amount of bid.	Per cent of value of work completed Nov. 1, '14.
1.	Frederick L. Cranford, Inc.....	Park Place and Beekman St., West Broadway to William Street.		28	$1,571,363.50	
2.	Smith, Hauser & MacIsaac, Inc..	William St., Beekman St. to Old Slip.		28	2,254,670.00	
3.	Assigned to Flinn-O'Rourke Co., Inc.	Old Slip, Manhattan, to Clark Street, Brooklyn.	Aug. 6, 1914	42	6,469,916.25	

Route No. 12—Eastern Parkway, Brooklyn, Subway.

1.	Cranford Company.....	Flatbush Ave. & St. Felix St., Fulton St. to Prospect Place.	July 16, 1914	30	2,195,296.25	3
1-A.	Cranford Company.....	Flatbush Ave., Prospect Place to Plaza.	May 4, 1914	30	2,225,519.25	7

Routes Nos. 36 & 37—Woodside, Astoria and Corona Elevated Line.

1.	Snare & Triest.....	Queensboro Bridge Plaza, Jackson Ave. & Diagonal Street.	Oct. 7, 1913	24	884,859.00	39
2.	Cooper & Evans Company.....	Second Ave., Beebe Ave. to Ditmars Ave.	Mar. 11, 1913	18	860,743.50	100
3.	E. E. Smith Contr. Co.....	Queens Boulevard & Roosevelt Ave., Van Dam St. to Alburtis Ave.	Mar. 11, 1913	18	2,063,588.00	84

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EXHIBIT A—(Continued).

Route No. 26—Steinway Tunnel.

Sec.	Contractor.	Limits.	Contract delivered.	Time for completion (months).	Amount of bid.	Per cent of value of work completed Nov. 1, '14.
	Rapid Transit Subway Const. Co.	Madison Ave. & 42d St., Manhattan, to Davis St., Queens.	Apr. 13, 1914	9	383,910.75	59
		Route No. 50—Steinway Tunnel Extension.				
	Degnon Contracting Company....	Davis St. & Ely Ave., Van Alst Ave. to Queensboro Bridge Plaza.	Dec. 31, 1913	18	$557,856.50	28
		Company Contracts.				
		Third-tracking Elevated Railroads in Manhattan and The Bronx.				
	Terry & Tench Co., Inc., Snare & Triest Co., and T. A. Gillespie Co.	Additional Tracks on Second, Third, and Ninth Avenue Elevated Lines.	Feb. 13, 1914	18	(Cost plus percentage)	

EXHIBIT A—(Continued).

New York Municipal Lines.

Route No. 5—Broadway-Fourth Avenue Subway.

Sec.	Contractor.	Limits.	Contract delivered.	Time for completion (months).	Amount of bid.	Per cent of value of work completed.
1.	F. L. Cranford, Inc.....	Trinity Place & Church St., Morris to Fulton Street.	Sept. 27, 1912	40	$1,222,269.20	85
1-A.	F. L. Cranford, Inc.....	Church & Vesey Sts., & Broadway, Fulton Street to Park Place.	Sept. 27, 1912	40	982,740.70	74.9
2.	Degnon Contracting Co.....	Broadway, Park Place to Walker St..	Feb. 6, 1912	40	2,355,828.50	96.3
2-A.	O'Rourke Eng. Const. Co.....	Broadway, Walker to Howard Street.	July 17, 1912	40	912,351.60	81.9
3.	Underpinning & Foundation Company.	Broadway, Howard to Bleecker St....	Jan. 19, 1912	40	2,295,086.50	89.1
4.	Dock Contractor Co.....	Broadway, Bleecker St. to Union Sq..	Aug. 19, 1913	36	2,578,078.00	64.4

Routes Nos. 4 & 36—Broadway-Fourth Avenue Subway.

1.	E. E. Smith Contr. Co.....	Broadway, Union Sq. to 26th St.....	Aug. 1, 1913	36	2,056,702.50	49.8
2.	U. S. Realty & Imp. Co.....	Broadway, 26th to 38th Street.....	July 16, 1914	32	2,657,004.50	1.3
5.	Degnon Contracting Co.....	59th & 60th Sts., 7th to 2d Ave.....	July 31, 1914	29	2,819,511.00	0.5

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EXHIBIT A—(Continued).

Route No. 33—Broadway-Fourth Avenue Subway.

Sec.	Contractor.	Limits.	Contract delivered.	Time for completion (months).	Amount of bid.	Per cent of value of work completed.
1.	Booth & Flinn, Ltd.....	Whitehall St., Battery Pl. to South St.	June 17, 1914	32	2,059,182.00	1.5
2.	Assigned to Flinn-O'Rourke Co., Inc.	Whitehall St., Manhattan to Montague Street, Brooklyn.	July 16, 1914	42	5,974,809.50	
3.	Flinn-O'Rourke Co., Inc.....	Montague St., Clinton St. to Flatbush Avenue Extension.	Oct. 9, 1914	36	3,395,152.00	

Route No. 20—Canal Street Subway.

2.	Underpinning and Foundation Company.	Canal St., Broadway to Bowery.....	July 16, 1914	32	1,822,994.25	3.9

Routes Nos. 9 & 11—Fourth Avenue, Brooklyn, Subway.

Six Sections.	Wm. Bradley; Smith, Scott & Co.; Tidewater Bldg. Co. & Thos. B. Bryson, and E. E. Smith Con. Co.	Manhattan Bridge to 43d Street.....	Nov. 9, 1909	..	*19,848,818.01	100

* Includes $200,000 for real estate.

EXHIBIT A—(Continued).

Route No. 11-B—Fourth Avenue, Brooklyn, Subway Extension.

Sec.	Contractor.	Limits.	Contract delivered.	Time for completion (months).	Amount of bid.	Per cent of value of work completed.
1.	Degnon Contracting Co.....	Fourth Ave., 43d to 61st Street.....	Oct. 4, 1912	24	$1,930,258.50	72
2.	Degnon Contracting Co.....	Fourth Ave., 61st to 86th Street.....	Oct. 4, 1912	24	1,904,171.25	60

Route No. 39—New Utrecht Avenue, Brooklyn, Elevated Line.

1.	New York Municipal Railway Corporation.	Fourth Ave., 33d to 38th St.; Culver Cut Fourth Ave. to Tenth Ave.	Feb. 3, 1914	18	.....	40
2.	Post & McCord, Inc.....	New Utrecht Ave., 86th St. & Stillwell Ave., 39th St. to Coney Island.	Dec. 31, 1913	18	1,072,190.00	27

Route No. 9-O—Centre Street Loop Subway.

	Bradley Con. Co.; Cranford Co.; Degnon Con. Co.	Centre Street, Brooklyn Bridge to Williamsburg Bridge.	——, 1907	..	**12,884,896.49	100

** Includes Real Estate.

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EXHIBIT A—(Continued).

Route No. 9-O—Centre Loop Reconstruction.

Sec.	Contractor.	Limits.	Contract delivered.	Time for completion (months).	Amount of bid.	Per cent of value of work completed.
	New York Municipal Railway Corporation.	Centre Street, Brooklyn Bridge to Williamsburg Bridge.	Apr. 25, 1913	..	325,000.00	100
	New York Municipal Railway Corporation.	Centre Street, Brooklyn Bridge to Williamsburg Bridge.	Feb. 3, 1914	9	500,000.00 (Approximate)	52
		Third Rail—Fourth Avenue Subway.				
	Thomas Crimmins Contracting Company.	Installation of Third-Rail and Track Rail Bonding.	30 days after completion of track-laying	..	197,442.20	
		Signal System—Centre Street Loop Subway.				
	Federal Signal Co.....	Signal System in Centre Street Loop..	Aug. 28, 1914	4	196,000.00	

EXHIBIT A—(Continued).

Cables.

Sec.	Contractor.	Limits.	Contract delivered.	Time for completion (months).	Amount of bid.	Per cent of value of work completed.
	Standard Underground Cable Co..	Installing Cables under Contract No. 4.	Oct. 16, 1914	5	162,644.20	

Ducts and Manholes.

	G. M. Gest.....	Installing Ducts and Manholes under Contract No. 4.	Oct. 23, 1914	5	34,492.50	

Miscellaneous City Contracts.

	Thomas Crimmins Contracting Co.	Track Installation, Fourth Avenue Subway. Laying of tracks from Manhattan Bridge to 86th St. Materials furnished by the City.	July 21, 1914	6	210,880.00	5

Station Finish, Fourth Avenue Subway.

	Station Const. Co., Inc.....	Six stations, 43d to 86th Street.....		..	251,133.72	

Special Work for Fourth Avenue Subway.

	Ramapo Iron Works.....	Portions 3, 9, 10, and 11.....		..	7,700.00	
	Indianapolis Switch & Frog Co...	Portions 4, 7, and 8.....		..	4,000.00	
	Pennsylvania Steel Co.....	Portions 5, 6, 12, 13, 14, 15, and 16....		..	37,426.50	

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EXHIBIT A—(Continued).

Track Materials for 4th Avenue Subway.

Sec.	Contractor.	Limits.	Contract delivered.	Time for completion (months).	Amount of bid.	Per cent of value of work completed.
	Bethlehem Steel Products Co.	Open hearth rails	Mar. 27, 1914	..	$127,108.00	
	Manganese Steel Rail Co.	Manganese rails	Mar. 25, "	..	43,199.52	
	The Rail Joint Co.	Splice bars	Mar. 27, "	..	19,035.00	
	Eastern Malleable Iron Co., Inc.	End inclines	Apr. 17, "	..	1,032.00	
	Eastern Malleable Iron Co., Inc.	Rail braces	Apr. 17, "	..	1,524.50	
	American Brake Shoe & Foundry Co.	Adjustable separators	Mar. 31, "	..	1,822.50	
	American Brake Shoe & Foundry Co.	Washers	Mar. 27, "	..	1,488.40	
	Lackawanna Steel Co.	Cut track spikes	Apr. 4, "	..	3,569.00	
	American Iron and Steel Mfg. Co.	Screw spikes	Mar. 31, "	..	2,560.00	
	American Iron and Steel Mfg. Co.	Bolts and nuts	Mar. 31, "	..	6,308.40	
	The Creepcheck Co., Inc.	Anti-creepers	Apr. 4, "	..	2,736.00	
	Herbert W. Lockwood	Tie plates, type A	May 19, "	..	13,818.00	
	Herbert W. Lockwood	Tie plates, type B	May 19, "	..	1,334.00	
	Elyria Iron and Steel Co.	Tie plates, type C	July 10, "	..	930.00	
	Elyria Iron and Steel Co.	Tie plates, type E	July 10, "	..	3,050.00	
	Ramapo Iron Works	Tie plates, type D	May 29, "	..	2,480.00	
	Robert A. Keasbey Co.	Felt pads	May 28, "	..	1,840.80	
	Upper Hudson Stone Co.	Ballast	May 19, "	..	77,480.00	
	J. H. Burton	Ties and timber	Mar. 27, "	..	96,540.00	

58 *Affidavit of William E. Heim; Read in Behalf of the Plaintiff.*

Supreme Court, New York County.

WILLIAM E. HEIM, Plaintiff,
against
EDWARD E. McCALL, MILO R. MALTBIE, J. SARGEANT CRAM, GEORGE V. S. Williams, and Robert C. Wood, as Members of and Constituting the Public Service Commission for the First District of the State of New York; Cranford Company and Flinn-O'Rourke Company, Inc., Defendants.

STATE AND COUNTY OF NEW YORK, *ss:*

William E. Heim, being duly sworn, deposes and says:

1. I am the plaintiff in the above entitled action.

2. The reason why an order to show cause why the injunction should not be made permanent pending the trial of the action is asked for, instead of proceeding by motion on the usual notice, is that the Public Service Commission of the State of New York for the First District has threatened and is about to declare a for-
59 feiture of each of the construction contracts in Exhibit "A" attached to the complaint mentioned, as deponent is informed and believes, and there is not time to make a motion upon the usual notice.

3. No previous application has been made to any court or judge for an order to show cause why the plaintiff should not have an injunction pending the trial of this action, or for an injunction pending the hearing and decision of a motion for an injunction pending the trial of this action.

WILLIAM E. HEIM.

Sworn to before me this 27th day of November, 1914.
THOMAS E. O'BRIEN,
Notary Public, Kings Co.

Ctf. filed in N. Y. Co.

60 *Affidavit of Ernest C. Moore; Read in Behalf of the Plaintiff.*

Supreme Court, New York County.

WILLIAM E. HEIM, Plaintiff,
against
EDWARD E. McCALL, MILO R. MALTBIE, J. SARGEANT CRAM, GEORGE V. S. Williams, and Robert C. Wood, as Members of and Constituting the Public Service Commission for the First District of the State — New York; Cranford Company and Flinn-O'Rourke Company, Inc., Defendants.

STATE AND COUNTY OF NEW YORK, *ss:*

Ernest C. Moore, being duly sworn, deposes and says:

I. I am a resident of the City of New York and am over twenty-

one years of age. I am and have been for twenty four years last past a civil engineer, and have been employed and engaged as such civil engineer as follows during the periods mentioned:

II. For the past twenty years I have been employed as a
61 contractor's engineer in the City of New York, during the greater part of the time. About 1891, I was employed by the William Wharton, Jr., Company, in the construction of the Third Avenue cable road in the City of New York, and later by the Third Avenue Railroad Company itself in the completion of this work, the period of time covered by these two contracts being about two years, and the nature of the work being the construction of the Third Avenue cable road, which is a surface railroad in the City of New York. This involved excavation, concrete work, timber work, steel work, paving, etc. Thereafter I was employed in the construction of Reservoir M, covering a period of about a year, up to some time in 1894. I was engineer for the contractors, Washburn, Shaler & Washburn. The nature of this work was the construction of a masonry dam in the Croton watershed, located at Purdy's Station, involving excavation, timber work, stone masonry, of the value of a million dollars or more. Then I was employed by the Metropolitan Traction Company in the construction of the Lexington Avenue cable road, of which I had entire charge. I was engaged in that for about eighteen months, and the work involved excavation in the street, concrete work, steel work, timber work, etc. I had under my direction as high as four thousand men at one time on this work. Then I became an independent contractor under the firm name of Evans & Moore. That continued for a period of three or four years, during which time we built the bulkheads and some of the piers of bridge in the Wallabout basin, Brooklyn, involving pile work, excavation, concrete and timber work. Then I built an outlet
62 sewer at New Rochelle, involving rock excavation, dredging, and the laying of pipe.

III. In the year 1900, I was employed by John B. McDonald as Resident Engineer in connection with the construction of that portion of the Rapid Transit subway which lies between 43rd Street and Park Avenue and 104th Street and Broadway, and continued in this capacity until the completion of the work in 1904. My duties in that work were to see that the work was performed in accordance with the plans and specifications of the contract for that portion of the subway. That work involved rock excavation, earth excavation, shoring, concrete, steel work, the reconstruction of various subsurface structures in the street, such as water mains, gas mains, electrical conduits, etc., the reconstruction of street surface, and the various items involved in general subway work. This work was similar to the work now being done under the present subway contracts in the carrying out and completion of the construction of the so called Dual system of rapid transit railroads.

IV. In my residency in that work there were employed many hundreds of laborers of various nationalities, and it was a matter of common knowledge that a large number of them were not citizens of the United States, among them being a large number of citizens of

the Kingdom of Italy, who, although residents of the City of New York, were not naturalized citizens of the United States.

V. I have been employed to make up estimates for various contractors in the City of New York, as a basis for their bids for
63 contracts to be let at public competitive bidding, and among them were many who were preparing to bid for work upon the so-called new subways involved in the contracts now under construction to carry out the Dual system mentioned in the complaint in the above entitled action. I prepared the estimate for a contractor who put in a bid for Section 5, Routes 4 and 36 of the Lexington Avenue-Seventh Avenue line, part of the dual system, the amount there being two and a half millions. I made a bid on Section 1, Routes 4 and 36, Lexington-Seventh Avenue subway, the contract for which was eventually let at the sum of $2,121,000; also on Section 1, Route 12, the contract price for which was $2,195,000; also on Section 1-A Route 12, the contract price for which was $2,225,000; also Section 2, Route 20, the amount for which the contract was let being $1,823,000.

VI. I was also Consulting Engineer for the United States Realty and Improvement Company on Sections 4 and 5 of Routes 4 and 38, Broadway-Lexington Avenue subway, for about nine months. My duties there took me on the work every day, and I had a chance to observe the grade and nationality of the laborers employed. There were employed altogether on that job during the time I was consulting engineer, about a thousand men, largely common laborers. Among that number it is safe to say that there were fifteen to twenty per cent who were not citizens of the United States. It is a matter of common knowledge that not only in the case of that contract or section, but in practically every section, if not every section now under construction in the Dual system mentioned in
64 Exhibit A attached to the complaint, there are and have been employed a considerable percentage of alien labor that is, laborers who are not citizens of the United States. That has been true in the City of New York on public contracts let by the municipality for municipal work during my whole experience as an engineer as above stated.

VII. That it has been the practice on the part of the Public Service Commission to issue monthly a statement showing the percentage of work completed, in the form of a pamphlet with the title of "Public Service Record, Public Service Commission, 154 Nassau Street, New York," with the volume and date and number, and the same was and is kept on file in the office of said Public Service Commission, and that Exhibit A attached to the complaint herein contains in the last column thereof, an abstract or extract from the record so made as to the percentage of completion of contracts, being taken from the bulletin or estimate for the month of November, 1914, Vol. 1, No. 6, to the original of which reference is hereby made, and the same is made a part of this affidavit to more fully show the nature and contents thereof.

VIII. I have kept in close and constant touch with the rapid transit development of the City of New York and all of the facts

herein stated with regard to the construction of such rapid transit routes and subways and the contracts for such construction, and the contracts for operation of said routes when constructed and equipped are all within my own personal knowledge, acquired from observation and experience, from my connection with said work as an
65 engineer and also from my familiarity with both the contract for the original Rapid Transit subway between John B. McDonald and the City of New York, and also the contracts referred to in the complaint between the City of New York and the Interborough Rapid Transit Company, and between the City of New York and the New York Municipal Railway Corporation. My duties also required me to be familiar with the various contracts and the forms thereof under which the various contractors referred to in Exhibit A attached to the complaint are engaged in construction work, and I am familiar with the provisions thereof.

IX. In or about the year 1896 the Board of Rapid Transit Railroad Commissioners, acting for and in behalf of the City of New York, and pursuant to Chapter 4 of the Laws of 1891 and the acts amending and supplementing the same, hereinafter referred to as the Rapid Transit Act, determined that a rapid transit railroad was necessary for the City of New York, and laid out and established a route for said railroad substantially as follows: Commencing at a point at or near the intersection of Broadway with Park Row; thence under Park Row, Centre Street, New Elm Street, Lafayette Place, Eighth Street, Fourth Avenue and Park Avenue to Forty-second Street, through Forty-second Street to Broadway, thence under Broadway to Fifty-ninth Street, thence under the Boulevard to One Hundred and Twenty-fourth Street; thence by viaduct over the Boulevard to One Hundred and Thirty-fourth Street; thence under the Boulevard and Eleventh Avenue to a point on Eleventh Avenue situate north of One Hundred and Ninetieth Street; thence to
66 Ellwood Street and over Ellwood Street to Kingsbridge Avenue; thence over Kingsbridge Avenue to Riverdale Avenue and over Riverdale Avenue to a point within five hundred feet of the present Kingsbridge station of the New York and Putnam Railroad Company. This route includes a loop under City Hall Park, lying under City Hall Park, Park Row, between the south end of Centre Street and Ann Street, and the portion of Broadway adjoining the City Hall Park lying between Vesey and Murray Streets. Also a route substantially as follows: Diverging from the aforesaid route near One Hundred and Third Street, under One Hundred and Fourth Street to and across Central Park West, under Central Park to Lenox Avenue and One Hundred and Tenth Street; thence under Lenox Avenue to a point near One Hundred and Forty-second Street; thence to the Harlem River, under the Harlem River to East One Hundred and Forty-ninth Street near its intersection with Third Avenue; thence under Third Avenue to Westchester Avenue; thence along Westchester Avenue to Southern Boulevard, to the Boston Road, to Bronx Park.

X. That on or about the 21st day of February, 1900, the said Board of Rapid Transit Railroad Commissioners, acting for and on

behalf of the City of New York, entered into a contract with the said John B. McDonald to construct, equip and operate a subway on the routes above described for the sum of $35,000,000, his right to operate being for the term of fifty years with the privilege of certain renewals.

67 XI. Said McDonald began work upon said subway or rapid transit route in or about the month of September, 1900, and the same was fully constructed and equipped by the said McDonald or his assignees on or about the 24th of October, 1904, and on or about the said date the said railroad was put in operation. Since said 21st day of February, 1900, various contracts for construction, equipment and operation of extensions to said routes and for new routes have been let and awarded to various contractors and prior to the year 1910 the following route had been fully constructed and equipped and was in operation under lease from the City of New York to the Interborough Rapid Transit Company, hereinafter called the Interborough Company, to wit: Contract No. 2, which begins at the Intersection of Park Row and Broadway in New York, and extends through Broadway down to the Battery, and through Battery Park, across and under the East River to Joralemon Street in the Borough of Brooklyn, through Joralemon Street to Fulton and through Fulton to Flatbush, and through Flatbush to the terminal station of the Long Island Railroad at Atlantic Avenue, also in the Borough of Brooklyn.

XII. In or about said year 1910 and for some time prior thereto, there was and had been considerable public discussion among residents of the City of New York, and considerable newspaper comment, all indicating dissatisfaction with the insufficiency and the inefficiency of the then existing rapid transit system of the City of New York and more particularly of that portion of the rapid

68 transit system of the City of New York which was owned by the City and leased for operation by it to the Interborough Company, and there was, and was recognized to be, a necessity for the construction, equipment and operation of many new railroads and routes in order to accommodate the increased population of the City of New York, and more particularly of the outlying districts of said city, but it was discovered by the City authorities, and by the then Public Service Commission, which had succeeded to the powers and functions of the Board of Rapid Transit Railroad Commissioners, that the necessary expense of mere construction, without regard to equipment, of anything approaching adequate additional routes, would involve the expenditure of many more millions of dollars than the City of New York had available for such purpose or for any other purpose, and which could not be raised or borrowed by the City of New York because of the fact that the raising or borrowing of the necessary sums of money would result in the said City's exceeding its legal and constitutional debt limit by many millions of dollars. In or about said year 1910, negotiations were begun by and between the City of New York and its Board of Estimate and Apportionment and the Public Service Commission on the one part, and the Interborough Company and the Brooklyn Union Elevated Railway Com-

pany on the other part, with a view to devising and arranging some method whereby the transit situation and the difficulties inherent therein might be relieved and improved. That from time to time the Board of Rapid Transit Railroad Commissioners and its successor in office, the Public Service Commission, acting under and
69 pursuant to the said Rapid Transit Act, had determined that various rapid transit railroads in addition to the existing rapid transit railroad were necessary for the convenience and comfort of the residents and taxpayers of the City, and determined and established routes and the general plans of construction thereof. That these routes so laid out permitted of the following extensions and additions to existing rapid transit lines:

I. Interborough Lines.

(*a*) An extension of the west side line in the Borough of Manhattan, south from Times Square to the Battery and thence under the East River to Borough Hall in the Borough of Brooklyn;

(*b*) An extension of the east side line in the Borough of Manhattan, north through Lexington Avenue and under the Harlem river to the Borough of the Bronx;

(*c*) Three extensions connecting with the northerly end of the east side subway in the Borough of Manhattan, and running northerly practically to the city line;

(*d*) A new route through Forty-second Street in the Borough of Manhattan to the East River and under that river by the so-called "Steinway Tunnel," and thence by various branches into the Borough of Queens.

(*e*) Various extensions of the then existing subway in the Borough of Brooklyn to the east and south.

70 II. Brooklyn Lines.

(*a*) Additional rapid transit line from Brooklyn extending under Broadway and 59th street to Queens.

(*b*) Additional rapid transit line extending under Fourth avenue with branches to South Brooklyn and Coney Island.

(*c*) Additional rapid transit line extending from 14th street and Sixth avenue in Manhattan under the East River to and through the eastern district of Brooklyn.

XIII. The said Board and the said Public Service Commission contemplated that such extensions and additions to the Interborough lines would form and did form in connection with the then existing subways, two complete routes through the Boroughs of Brooklyn and Manhattan, each terminating in the Borough of the Bronx, and a lateral line to the Borough of Queens, with feeding extensions reaching out by branches, into the outlying districts of the Boroughs of the Bronx, Queens and Brooklyn, and that such extensions and additions to the Interborough lines would, with the existing Interborough and Brooklyn lines, form and did form a complete and comprehensive rapid transit system for the accom-odation of the entire city and its residents and taxpayers. Said above mentioned

negotiations between the City authorities and the Public Service Commission on the one part, and the said Interborough Company and the said Brooklyn Company on the other part, finally re-
71 sulted in the execution of the respective agreements hereinafter mentioned, between the City and the Interborough Company and the City and the New York Municipal Railway Corporation, which was a railroad corporation formed and organized in the interests of the above mentioned Brooklyn Union Elevated Railway Company and which was the corporation the formation of which was contemplated throughout the negotiations leading up to the execution of said agreements.

XIV. At the time of the execution of said agreements, the Interborough Company, under lease from the City of New York, was operating all the rapid transit routes which at that time were owned by the City of New York and in operation, and which except for a short section under the East River from Bowling Green to Borough Hall, and thence to Flatbush Avenue in the Borough of Brooklyn, were located entirely in the Boroughs of Manhattan and the Bronx. At the said time of the execution of the said agreements, the New York Consolidated Railroad Company, was the owner of practically all of the lines of rapid transit railroad operated in the Borough of Brooklyn, and of practically all the lines of rapid transit railroad operated in the Borough of Queens, and the entire scheme and purpose of the said agreements were to render possible in the shortest possible time, the construction, equipment and operation of extensions to existing railroads and routes and new routes, so as to furnish a complete and adequate rapid transit system for the City of New York, on a single five cent fare basis, that is, to entitle passengers to be carried over the entire system or route made up of the old
72 and existing routes and the new routes, with general transfer privileges, for a single fare of five cents.

XV. On or about the 19th day of March, 1913, the City entered into an agreement with the Interborough Company, which provides among other things

(*a*) For the construction by the City of certain new routes in the Boroughs of Manhattan and the Bronx and under the East River, at an estimated cost of approximately one hundred twelve million dollars ($112,000,000.00), of which approximately fifty-eight million dollars ($58,000,000.00) was to be contributed by the Interborough Company;

(*b*) For the equipment of said routes by the Interborough Company, at an estimated cost of twenty two million dollars ($22,000,000.00), to be paid by the Interborough Company:

(*c*) For a lease of said new routes to the Interborough Company for a period of forty-nine years; and for the reduction of the term of its existing leases by the Interborough Company, so that the same would expire at the same time with the leases above mentioned, and containing a further provision for the recapture of the said routes and the right to operate the same at any time after ten years after the execution of the contract;

(*d*) For the operation of said routes by the Interborough
73 Company in conjunction with the routes theretofore operated by that Company, on a single five cent fare basis, that is, to entitle passengers to be carried over the entire system or route made up of the old and existing routes and the new routes, with general transfer privileges, for a single fare of five cents;

(*e*) For the pooling of the receipts from such operation of said old and new routes and the application of the said receipts for the following purposes in the order mentioned:

(1) Payment of operating expenses; and other fixed charges, including a depreciation charge;

(2) Payment to the Interborough Company of six million three hundred thirty-five thousand dollars ($6,335,000.00) annually, being the estimated net yearly earnings of the old routes for the two fiscal years ending June 30, 1911;

(3) Payment to the Interborough Company of six per cent on its contribution to the costs of construction and equipment of new routes;

(4) Payment to the City of 8.76 per cent on its expenditures;

(5) Payment of the remainder to the City and the Interborough Company in equal parts or shares.

XVI. On or about the 19th day of March, 1913, the
74 City entered in an agreement with the New York Municipal Railway Corporation which was the corporation formed in the interest of the Brooklyn Union Elevated Railway Company, and the corporation contemplated to be so formed in the negotiations above mentioned prior to the execution of said contract, which said contract provides among other things:

(*a*) For the construction by the City of certain new routes in the Borough of Brooklyn and adjacent territory at an estimated cost of one hundred million dollars ($100,000,000.00) of which approximately thirteen million five hundred thousand dollars ($13,500,000) was to be contributed by that corporation;

(*b*) For the construction of extensions to existing railroads in the Borough of Brooklyn and adjacent territory, which are not owned by the City, and equipment of the same, and for general improvements in the said existing railroads, at an estimated cost of twenty six million dollars ($26,000,000.00), to be paid by the New York Municipal Railway Corporation;

(*c*) For the equipment of said new routes at an estimated cost of twenty-four million dollars ($24,000,000), to be paid by that corporation;

(*d*) For a lease of the new routes constructed by the City to the said Corporation for a period of years; and for the recapture
75 of the said routes and the right to operate the same at any time after ten years after the execution of the contract;

(*e*) For the operation of said new routes by the said corporation in conjunction with the routes theretofore owned or operated by the Brooklyn Union Elevated Company and as extended or improved on a single five cent fare basis, that is, to entitle passengers to be carried over the entire system or route made up of the old and

existing routes and the new routes and extensions, with general transfer privileges, for a single fare of five cents;

(*f*) For the pooling of the receipts from such operation of said new and old routes and the application of said receipts for the following purposes in the order mentioned:

(1) Payment of operating expenses and other fixed charges, including a depreciation charge and a charge for renewals;

(2) Payment to the New York Municipal Railway Corporation of three million five hundred thousand dollars ($3,500,000) the estimated average annual earnings of the existing routes to be operated with the new routes;

(3) Payment to the same corporation of 6% upon its investment in new lines;

(4) Payment to the City of the interest and sinking fund charges on the bonds issued by it to defray the cost of construction of said new lines;

76 (5) Payment of the remainder to the City and the New York Municipal Railway Corporation in equal parts or shares.

XVII. That to accomplish the construction of said new routes to be owned by the City but leased to either the said Interborough Company or the New York Municipal Railway Corporation, and to be operated as so leased, in connection with and as a part and parcel of the old routes theretofore operated by said respective companies, and in the case of the Interborough Company leased by it from the City of New York, and in the case of the New York Municipal Railway Corporation owned by the Brooklyn Union Elevated Railway Company, it became necessary for the said Public Service Commission to let various contracts for construction, and accordingly contracts were duly prepared, filed, advertised, approved by the City authorities, and let for the respective portions of said routes, at the respective costs, to be completed prior to the respective dates, and to the respective contractors, indicated and more fully stated in Exhibit A attached to the complaint herein.

XVIII. It has been the uniform course and practice of the Board of Rapid Transit Railroad Commissioners under the original Rapid Transit Act, and of its successor in office, the Public Service Commission, to include in each construction contract a provision for the making of monthly estimates by its Chief Engineer, of the value of work done to the date of the estimate, and to file the said estimates with the said Board of Commissioners or with the said Public Service Commission, to the end that said Board of Commissioners

77 or said Public Service Commission, might certify vouchers based on said estimates to the Comptroller of the City of New York, and to the end that said Comptroller might draw and issue city warrants payable to the contractor monthly, representing in amount eighty-five (85) or ninety (90) per cent of the said monthly estimates, and in fact it would be practically impossible for any contractor upon a work of any such magnitude as a subway construction contract, to finance said construction without receiving such monthly instalments of payments for work done, and it has been the uniform course and practice of said Chief Engineer, said

Board of Commissioners and said Public Service Commission and said Comptroller to respectively file said monthly estimates, certify vouchers thereon, and draw, execute and deliver city warrants in payment of either 85% or 90% of the amount of said estimates, all of which is done in carrying out the provisions of the contracts, copies of which provisions as to payment are set forth in the complaint.

XIX. For more than fifteen years last past I have made a special study of labor conditions and have been and am familiar with such conditions and the extent to which workmen who are citizens of the United States are available for construction work in and about the City of New York, and in and about the State of New York, and with the number and nationality and citizenship of the workmen available for general municipal works, and available particularly for subway construction at the present time and for years past, and am satisfied from my knowledge and observation that it is and has
78 been, throughout that period, impossible to obtain a sufficient force and number of laborers and mechanics in the City of New York who are citizens of either the State of New York or of the United States, to carry out and perform the many and various contracts for municipal work, particularly the work necessary for the construction of the so-called new subway or dual system under the contracts let and existing therefor, in order to complete the same or any substantial part of the same within the periods provided for in said contracts for construction respectively, or to complete the entire system within the time contemplated by the city authorities and said Interborough Company and said New York Municipal Railway Corporation, and under the plan pursuant to which said contracts are made, or for or within the total amounts estimated as the cost of the completion of said dual system.

XX. That all this is a matter of common knowledge among contractors and their employes and has been, and that no question has ever been raised, to the knowledge of deponent or as far as he has heard, until within a week or ten days past, about the right of any contractor engaged in municipal work in the City of New York to employ laborers who are not citizens of the United States in the performance of any contract for municipal work, but that recently and within said time such questions have been raised and the claim for the first time asserted, so far as your deponent knows, that the provisions of Section 14 of the Labor Law prohibit the employment of alien labor, that is, laborers who are not citizens of the United States, on such contract work, and that certain citizens or residents
79 of the State of New York have raised such question and, as deponent is informed and believes, have asked the Public Service Commission and the members thereof, to declare certain contracts illegal and void where such laborers have been employed or are employed by contractors on municipal work, and particularly the contractors whose names appear in Exhibit A attached to the complaint, and have served notice on each and all the contractors whose names appear in said Exhibit that a similar request will be

made of the Public Service Commission for a declaration of the forfeiture of the respective contracts of each of said contractors.

XXI. That in deponent's experience as engineer and contractor, and from knowledge acquired in making up bids for various contractors who have bid for contracts for municipal work in the City of New York, including the estimates deponent made up as hereinbefore stated for bidders on certain sections of the dual subway system described, the practice and method of making up said bids and estimates have been and are to first figure out as nearly as possible the cost of material and labor required for the work, and of financing the same, and insurance and overhead charges, including plant, deducting from the cost of the plant, however, its estimated salvage at the close of the work, and then to add thereto a percentage estimated to cover unexpected accidents or difficulties, and to the total of the sum thus reached to add a given percentage, usually not less than twenty per cent and often very much higher, as profits. That it is also a custom in letting contracts for public work where
80 they are not let for a lump sum or on the basis of unit prices, to let them on the basis of actual cost plus a given percentage of profit for superintendence, usually ranging from ten to fifteen per cent. That as a matter of fact the contract forms, which are uniform in regard to this subway work, contain provisions that in cases where the work does not come within any classification for which unit prices are fixed or can be applied, under the terms of the contract, the contractor is required to do the same on the basis of actual cost plus ten per cent.

XXII. That the various above mentioned contracts by and between the said Public Service Commission and the Interborough Company, and by and between the said Public Service Commission and the New York Municipal Railway Corporation, and by and between the said Public Service Commission and each of the contractors mentioned above and in the complaint herein and in Exhibit A attached to the said complaint herein, are each and all matters of public record and are in the possession of the defendants herein.

ERNEST C. MOORE.

Sworn to before me this 1st day of December, 1914.

THOMAS E. O'BRIEN,
Notary Public, Kings County.

Certificate filed in New York County.

81 *Affidavit of John S. Russell; Read in Behalf of the Plaintiff.*

Supreme Court, New York County.

WILLIAM E. HEIM, Plaintiff,
against
EDWARD E. MCCALL and Others, Defendants.

STATE AND COUNTY OF NEW YORK, *ss:*

John S. Russell, being duly sworn, says:

I. I am a clerk in the office of Thomas F. Conway, attorney for the plaintiff herein, and familiar with all proceedings had herein.

II. The summons herein has not yet been served and issue has not yet been joined.

III. The next term of Court at which this action can be tried will be held on the first Monday of January, 1915.

JOHN S. RUSSELL.

Sworn to before me this 28th day of November, 1914.
THOMAS E. O'BRIEN,
Notary Public, Kings County.

Ctf. filed in N. Y. Co.

82 *Affidavit of Thomas E. O'Brien; Read in Behalf of the Plaintiff.*

Supreme Court, New York County.

WILLIAM E. HEIM, Plaintiff,
against
EDWARD E. MCCALL, MILO R. MALTBIE, J. SARGEANT CRAM, GEORGE V. S. Williams, and Robert C. Wood, as Members of and Constituting the Public Service Commission for the First District of the State of New York; Cranford Company, and Flinn-O'Rourke Company, Inc., Defendants.

STATE AND COUNTY OF NEW YORK, *ss:*

Thomas E. O'Brien, being duly sworn, deposes and says:

I. I am an attorney and counsellor at law, duly admitted to practice in the State of New York.

II. I have read true copies of treaties made by and between the United States of America and various foreign powers, and more particularly the treaties entered into between the United States of America and His Majesty the King of Italy, dated respec-
83 tively the 26th day of February, 1871, and the 25th day of February, 1913. Said treaty dated the 26th day of February, 1871, contains the following clause:

"Article III.

The citizens of each of the high contracting parties shall receive, in the States and Territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives, on their submitting themselves to the conditions imposed upon the natives."

Said treaty dated the 25th day of February, 1913, contains the following clause:

"Article I.

It is agreed between the High Contracting Parties that the first paragraph of Article III of the Treaty of Commerce and Navigation of February 26, 1871, between the United States and Italy shall be replaced by the following provision:

'The citizens of each of the High Contracting Parties shall receive in the States and Territories of the other the most constant security and protection for their persons and property and for their rights, including that form of protection granted by any State or national law which establishes a civil responsibility for injuries or for death caused by negligence or fault and gives to relatives
84 or heirs of the injured party a right of action, which right shall not be restricted on account of the nationality of said relatives or heirs; and shall enjoy in this respect the same rights and privileges as are or shall be granted to nationals, provided that they submit themselves to the conditions imposed on the latter.'"

III. In many of the above mentioned treaties by and between the United States of America and foreign powers, and more particularly in the treaties of the said United States of America with the Kingdom of Italy, and with the respective Kingdoms of Great Britain and Ireland, and Belgium, and with the respective Empires of Germany and Austria Hungary and with the Republic of France, there appears and is contained what is known as the "most favored nation" clause. That the said "most favored nation" clause as it appears in each of said treaties, while not identical in language, in substance always provides that the citizens of the foreign power with whom the said treaty is made, residing in the United States, shall enjoy all the privileges, rights and immunities which citizens of any power most favored in any existing treaty with the United States, enjoy.

THOMAS E. O'BRIEN.

Sworn to before me this 27th day of November, 1914.

NELLIE M. FAILEY,
Notary Public, N. Y. Co.

85 *Affidavit of Thomas E. O'Brien; Read in Behalf of the Plaintiff.*

Supreme Court, New York County.

WILLIAM E. HEIM, Plaintiff,
against
EDWARD E. MCCALL and Others, Defendants.

STATE AND COUNTY OF NEW YORK, *ss:*

Thomas E. O'Brien, being duly sworn, says:

1. On the 27th day of November, 1914, in response to an inquiry addressed to him by the plaintiff's attorney as to the intended action of the Public Service Commission of the First District of the State of New York, with regard to the complaints that had been made to said Public Service Commission, by citizens, of the employment of laborers and mechanics upon the subway construction contracts which are mentioned in the complaint herein, and in Exhibit "A" thereto annexed, Hon. Edward E. McCall, the chairman of said Public Service Commission, for and in behalf of said Public Service Commission, and as chairman thereof, stated, in my presence, that the said Public Service Commission had but
86 one course open to it and intended to pursue that course, to-wit, to obey the language contained in the Labor Law of the State of New York and pursuant to the language of said Labor Law had refused to prepare and certify vouchers on monthly estimates of its Chief Engineer of work done under some of said subway construction contracts and intended to declare each and all of said subway construction contracts upon which the Commission should be convinced that aliens are employed, void and forfeited, as the Commission is bound to treat the Labor Law as a valid law.

THOMAS E. O'BRIEN.

Sworn to before me this 27th day of November, 1914.

NELLIE M. FAILEY,
Notary Public, N. Y. Co.

87 *Taxpayer's Bond; Read in Behalf of Plaintiff.*

Supreme Court, New York County.

WILLIAM E. HEIM, Plaintiff,
against
EDWARD E. McCALL, MILO R. MALTBIE, J. SARGEANT CRAM, GEORGE V. S. Williams, and Robert C. Wood, as Members of and Constituting the Public Service Commission for the First District of the State of New York; Cranford Company, and Flinn-O'Rourke Company, Inc., Defendants.

Know all men by these presents:

That we, William E. Heim, the plaintiff above named, as Principal, and National Surety Company, having an office and usual place of business at 115 Broadway, Borough of Manhattan, in the City of New York, as Surety, are held and firmly bound unto Edward E. McCall, Milo R. Maltbie, J. Sargeant Cram, George V. S. Williams and Robert C. Wood, as members of and constituting the Public Service Commission for the First District of the State of New York, the defendants herein, in the penal sum of One Thousand
88 Dollars for the which payment well and truly to be made, the said William E. Heim binds himself, his heirs, executors and administrators, and the said National Surety Company binds itself, its successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals: and dated this 27th day of November in the year One Thousand Nine Hundred and Fourteen.

Whereas: the above bounden William E. Heim, has this day begun an action in the Supreme Court against Edward E. McCall, Milo R. Maltbie, J. Sargeant Cram, George V. S. Williams and Robert C. Wood, as members of and constituting the Public Service Commission for the First District of the State of New York, to restrain the said defendants from the alleged illegal declaration of a forfeiture of certain contracts heretofore made by the said Public Service Commission acting for and in behalf of the City of New York, providing for the construction of new rapid transit routes in the City of New York, which declaration is threatened and about to be made but which it is alleged by the plaintiff is or will be illegal and a waste of the funds of said city; and for other relief.

Now, Therefore, the condition of this obligation is such, that if the above bounden William E. Heim, his heirs, executors or administrators shall well and truly pay or cause to be paid to the Defendants above named all costs which may be awarded to the Defendants in said action if the Court shall finally determine the same in
89 favor of the Defendants, then this obligation shall be void, otherwise, to remain in full force and effect.

W. E. HEIM. [L. S.]

Sealed and delivered in the presence of
THOMAS O'BRIEN.

[Seal of Nat'l Surety Co.]

NATIONAL SURETY COMPANY,
By WILLIAM H. THOMPSON,
Resident Vice-President.

Attest:
E. M. McCARTHY,
Res. Ass't Secretary.

STATE OF NEW YORK,
County of New York, ss:

On this 27th day of November, 1914, before me personally came William E. Heim, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

THOMAS E. O'BRIEN,
Notary Public, Kings County.

Ctf. filed in N. Y. Co.

90 STATE OF NEW YORK,
County of New York, ss:

On this 27th day of November, 1914, before me personally appeared Wm. A. Thompson, Resident Vice-President of the National Surety Company, with whom I am personally acquainted, who, being by me duly sworn, said that he resides in the County of New York; that he is the Resident Vice-President of the National Surety Company, the corporation described in and which executed the within instrument; that he knows the corporate seal of said Company; that the seal affixed to the within instrument is such corporate seal; that it was affixed by the order of the Board of Directors of said Company, and that he signed said instrument as Resident Vice-President of said Company by like authority, and that the liabilities of said Company do not exceed its assets as determined by an audit of the Company's annual statement filed with the Superintendent of Insurance of the State of New York and certified to by said Superintendent, pursuant to section 2 of chapter 182 of the Laws of the State of New York for the year 1913, amending section 182 of chapter 33 of the Laws of the State of New York for the year 1909, constituting chapter 28 of the Consolidated Laws of the State of New York. And said Wm. A. Thompson further said that he is acquainted with E. M. McCarthy and knows him to be the Resident Assistant Secretary of said Company; that the signature of the said E. M. McCarthy subscribed to the said instrument is in the genuine handwriting of the said E. M. McCarthy and was thereto subscribed by the like
91 order of the said Board of Directors and in the presence of him, the said Resident Vice-President.

P. P. MARCONE,
Notary Public.

Copy of By-law.

Be it remembered: That at a regular meeting of the Board of Directors of the National Surety Company, duly called and held on the sixth day of February, 1912, a quorum being present, the following By-Law was adopted:

Article XIII.

SECTION 1. Signatures required.—All bonds, recognizances, or contracts of indemnity, policies of insurance, and all other writings obligatory in the nature thereof, shall be signed by the President, a Vice-President, a Resident Vice-President, or Attorney-in-Fact, and shall have the seal of the Company affixed thereto, duly attested by the Secretary, an Assistant Secretary, or Resident Assistant Secretary. All Vice-Presidents and Resident Vice-Presidents shall each have authority to sign such instruments, whether the President be absent or incapacitated, or not, and the Assistant Secretaries and Resident Assistant Secretaries shall each have authority to seal and attest such instruments, whether the Secretary be absent or incapacitated, or not; and the Attorneys-in-Fact shall each have authority, in the discretion of such Attorneys-in-Fact, to affix to such instruments an impression of the Company's seal, whether the Secretary be absent or incapacitated, or not, or to attach the individual seal of the Attorney-in-Fact, thereto, or to use the scroll of the
92 Attorney-in-Fact, or a wafer, wax, or other similar adhesive substance affixed thereto, or a seal of paper or other similar substance affixed thereto by mucilage, or other adhesive substance, or use the word "seal" or the letters "l. s." opposite the signature of such Attorneys-in-Fact, as the case may be.

STATE OF NEW YORK,
County of New York, ss:

I, E. M. McCarthy, Resident Assistant Secretary of the National Surety Company, have compared the foregoing By-Law with the original thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and the whole of said original By-Law.

Given under my hand and the seal of the Company, in the County of New York, this 27th day of November 1914.

[SEAL.] E. M. McCARTHY,
Resident Assistant Secretary.

Indorsed.

I approve of the within bond and of the sufficiency of the surety Nov. 28, 1914.

VERNON M. DAVIS,
Justice of the Supreme Court of the State of New York.

93 *Undertaking; Read on Behalf of Plaintiff.*

Supreme Court, New York County.

WILLIAM E. HEIM, Plaintiff,
against
EDWARD E. McCALL et al., Defendants.

Undertaking on Injunction.

The above named plaintiff having applied to one of the Justices of this Court for an Injunction in the above entitled action, restraining the defendants Edward E. McCall, Milo R. Maltbie, J. Sargeant Cram, George V. S. Williams and Robert C. Wood, as members of, and constituting the Public Service Commission for the First District of the State of New York, and each of them, and their and each of their deputies, agents, attorneys and servants, until the further order of the Court, from signing, executing, or otherwise effecting a declaration of the forfeiture of the subway route construction contracts in the complaint and Schedule "A," thereto annexed, to which The City of New York or the Public Service Commission, acting for and in behalf of the said City of New York, is a party, etc., as is more fully set forth in the papers in said application.

Now, therefore, National Surety Company, a corporation,
94 under the Laws of the State of New York, having an office and principal place of business at No. 115 Broadway, in the City of New York, does hereby pursuant to the Statute in such case made and provided, undertake in the sum of Five Thousand ($5,000.00) dollars that the plaintiff will pay to the defendant so enjoined, such damages, not exceeding the before mentioned sum, as they may sustain by reason of the injunction, if the Court finally decides that the plaintiff was not entitled thereto such damages to be ascertained and determined by the Court, or by a Referee appointed by the Court, or by a writ of inquiry, or otherwise as the Court shall direct.

Dated, New York, November 27, 1914.

NATIONAL SURETY COMPANY,
By WM. A. THOMPSON,
Resident Vice President.

Attest:

E. M. McCARTHY,
Resident Assistant Secretary.

Copy of By-law.

Be it remembered: That at a regular meeting of the Board of Directors of the National Surety Company, duly called and held on the sixth day of February, 1912, a quorum being present, the following By-Law was adopted:

Article XIII.

SECTION 1. Signatures required.—All bonds, recognizances, or contracts of indemnity, policies of insurance, and all other writings obligatory in the nature thereof, shall be signed by the President, a Vice-President, a Resident Vice-President, or Attorney-in-
95 Fact, and shall have the seal of the Company affixed thereto, duly attested by the Secretary, an Assistant Secretary, or Resident Assistant Secretary. All Vice-Presidents and Resident Vice-Presidents shall each have authority to sign such instruments, whether the President be absent or incapacitated, or not, and the Assistant Secretaries and Resident Assistant Secretaries shall each have authority to seal and attest such instruments, whether the Secretary be absent or incapacitated, or not; and the Attorneys-in-Fact shall each have authority, in the discretion of such Attorneys-in-Fact, to affix to such instruments an impression of the Company's seal, whether the Secretary be absent or incapacitated or not, or to attach the individual seal of the Attorney-in-Fact thereto, or to use the scroll of the Attorney-in-Fact, or a wafer, wax, or other similar adhesive substance affixed thereto, or a seal of paper or other similar substance affixed thereto by mucilage, or other adhesive substance, or use the word "seal" or the letters "l. s." opposite the signature of such Attorneys-in-Fact, as the case may be.

CITY AND COUNTY OF NEW YORK, *ss:*

I, E. M. McCarthy, Resident Assistant Secretary of the National Surety Company, have compared the foregoing By-Law with the original thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original By-Law.

Given under my hand and the seal of the Company, in the City of New York, this 27th day of November, 1914.

E. M. McCARTHY,
Resident Assistant Secretary.

96 CITY AND COUNTY OF NEW YORK, *ss:*

On this 27th day of November, 1914, before me personally appeared Wm. A. Thompson, Resident Vice-President of the National Surety Company, with whom I am personally acquainted, who, being by me duly sworn, said that he resides in the City of New York; that he is the Resident Vice-President of the National Surety Company, the corporation described in and who executed the within instrument; that he knows the corporate seal of said Company; that the seal affixed to the within instrument is such corporate seal; that it was affixed by order of the Board of Directors of said Company, and that he signed said instrument as Resident Vice-President of said Company by like authority; and that the liabilities of said Company do not exceed its assets, as ascertained in the manner provided in Section 3, Chapter 720, of New York Session Laws of 1893. And the said Wm. A. Thompson further said that he is acquainted with

E. M. McCarthy and knows him to be the Resident Assistant Secretary of said Company; that the signature of the said E. M. McCarthy subscribed to the said instrument is in the genuine handwriting of the said E. M. McCarthy, and was thereto subscribed by the like order of the said Board of Directors and in the presence of him, the said Resident Vice-President.

PAUL P. MARCONE,
Notary Public.

Indorsed.

I approve of the within bond, and of the sufficiency of the surety. Nov. 28, 1914.

VERNON M. DAVIS,
J. S. C. of State of New York.

97 *Demurrer to Amended Complaint; Read in Behalf of Defendants McCall and Others.*

Supreme Court of the State of New York, New York County.

Index No. 32323—1914.

WILLIAM E. HEIM, Plaintiff,
against
EDWARD E. MCCALL, MILO R. MALTBIE, J. SERGEANT CRAM, GEORGE V. S. WILLIAMS, and ROBERT C. WOOD, as Members of and Constituting the Public Service Commission for the First District of the State of New York, Defendants.

Demurrer.

The defendants, Edward E. McCall, Milo R. Maltbie, J. Sergeant Cram, George V. S. Williams and Robert C. Wood as members of and constituting the Public Service Commission for the First District demur to the amended complaint herein on the ground that it does not state facts sufficient to constitute a cause of action.

GEORGE S. COLEMAN,
Counsel to the Public Service Commission for the First District.

Office and Post Office Address, 154 Nassau Street, Borough of Manhattan, New York City.

98 *Affidavit of John Gill; Read in Behalf of Amicus Curiæ.*

Supreme Court, New York County.

WILLIAM HEIM, Plaintiff,
against
EDWARD E. MCCALL et al., etc., Defendants.

STATE, CITY AND COUNTY OF NEW YORK, *ss:*

John Gill, being duly sworn, deposes and says that he resides at No. 1613 Overing street, in the Borough of the Bronx, City and State of New York, and is the delegate and legislative agent of the Bricklayers, Masons and Plasterers' Union of the State of New York, an organization of over twenty-five thousand men; that upon his complaint made as a result of investigations, and placed before the Public Service Commission of the City of New York, these proceedings and this action were precipitated.

That deponent has read the affidavits and complaint filed on behalf of the plaintiff in the above-entitled action, and that by agreement between the plaintiff and the defendants in this action, and their respective attorneys, he has been requested and permitted to come in this action not as a party to the action, but as an amicus curiæ, and file whatever affidavits he deems necessary to
99 controvert facts set forth in the complaint and moving papers herein, upon which the temporary injunction herein was granted.

That deponent is familiar with the subway work now under construction in the City of New York, and decidedly familiar with labor conditions in the City of New York, by reason of the fact that he has been connected with labor organization- for over twenty years; that he has attended regularly the meetings of the Central Federated Union of the City of New York, also State International Conventions of the Bricklayers, Masons and Plasterers' Union, also State Conventions of the State Federation of Labor, and meetings of allied trades in the building and construction industries, and that he is entirely familiar with the labor situation at the present time, and has been for the past twenty years; that he has been selected as business agent and legislative agent of his organization to represent it in all labor matters, by reason of his wide experience and knowledge of labor conditions generally, in their relation to construction work.

That the statement made in the affidavit of one Ernest C. Moore, attached to the moving papers, to the effect that the question of employing alien labor has never been raised in the City of New York except within the past ten days, is untrue. About a year and a half ago, deponent caused to be filed in the office of the Public Service Commission, a sworn complaint against the Oscar Daniels Company, one of the general contractors engaged in constructing the subway work on the section running under Lexington avenue, between 108th

and 117th street, in the Borough of Manhattan, City of New
100 York, and that the Public Service Commission publicly acted upon said matter by summoning the said Oscar Daniels Company to appear before it at a public hearing, where an agreement was reached between the complainant and the said Oscar Daniels Company, wherein the said Company agreed to comply with the law and to hire and employ American citizens to do bricklayers' work. That deponent knows of his own knowledge that the question of alien labor on the subways has been discussed before meetings of the Central Federated Union, and publicly, practically since the subway work began, but that the organizations have always considered it a matter of duty devolving upon the Public Service Commission, by reason of the fact that the contracts between the City and the contractors provided that the Labor Law be complied with, these provisions involving as they do, prohibitions against employment of aliens upon public work; and that the Public Service Commission has inspectors specially employed to see that the provisions of the contract are complied with.

That the proceedings leading up to this action were commenced about six months ago, by the filing of a complaint against the Dock Contractor Company, which complaint was publicly acted upon by the Public Service Commission, which stated at a public hearing that it desired all violations of which deponent had evidence, presented at this hearing, as a result of which, deponent caused the books and records of the Dock Contractor Company to be subpœnaed, which were offered in evidence, and which showed that approximately two hundred and fifty aliens out of eight hundred men employed were working on one section alone; that as a result of this evidence,
101 the Public Service Commission, as deponent is informed and verily believes, caused the moneys due and owing to the said Dock Contractor Company to be held up, and threatened to cancel their contract under the provisions of the Labor Law. That at the hearing of the charges against the Dock Contractor Company, evidence was adduced by the presentation of three aliens that the Underpinning & Foundation Company was also violating the Labor Law with reference to employing aliens upon this work, which, as deponent is informed and verily believes, resulted in similar action being taken against that Company. That one of the aliens who testified at the aforesaid public hearing, admitted that he had been in the United States for twelve years and had never taken out citizenship papers, while two other aliens who had been in the United States for shorter periods, but long enough for them to apply for first papers, both testified that they had not even procured first papers or made any application for them. That the attorney for the Dock Contractor Company at the conclusion of the hearing of the Public Service Commission stated publicly and on the record, that since November 7th, 1914, the said Dock Contractor Company which was engaged in constructing Section 4 of the subway, was complying with the law requiring the employment of American citizens upon public work, and that thereafter and on November 27th, 1914, W. V. McMeni-

men, the Vice-President and General Manager of the said Company, made the following affidavit:

"STATE, CITY, AND COUNTY OF NEW YORK, *ss:*

W. V. McMenimen, being duly sworn, deposes and says
102 that he is Vice-President and General Manager of the Dock Contractor Company, and that the Dock Contractor Company, which is now constructing Section 4 of the new Lexington Avenue subway in the Borough of Manhattan, City of New York, has not now, and has not, certainly since November 7th, 1914, employed any aliens on its work, and that only citizens of the United States are now employed.

Deponent further says that the Dock Contractor Company intends to comply with the law in the future as it is complying with it at present.

W. V. McMENIMEN.

Sworn to before me this 27th day of November, 1914.

R. FRANK THOMPSON,
Commissioner of Deeds, New York City."

That thereupon, deponent caused to be filed in the office of the Public Service Commission, the following withdrawal of his complaint, which to all intents and purposes, constituted a withdrawal of the complaint on the part of deponent in the following language:

"Upon the annexed affidavit signed by W. V. McMenimen whereby it appears that the Dock Contractor Company is now complying with Section 14 of the Labor Law, requiring contractors to employ citizens to do public work, I do hereby formally withdraw my complaint against it.

103 In this connection, I desire to have it noted that it is not my intention, nor has it been since this controversy started, to inflict hardship upon contractors except in so far as it is necessary to secure from them a compliance with the law. Since this object has been attained in the case of the Dock Contractor Company, and since they have assured me that they will comply with the law in the future, I have consented to withdraw my complaint.

Dated November 27, 1914.

JOHN GILL."

That the Court will see in reading the foregoing withdrawal of complaint, that so far as the allegations in the moving papers concerning the withholding of moneys due under contract by refusing to certify vouchers on the part of the Public Service Commission, that there apparently has not been since November 27th, 1914, any proceeding before the Public Service Commission so far as the complainant is concerned, and to the best knowledge and information of the deponent, so far as any other complainant is concerned, in order to justify the Public Service Commission in refusing to certify to the vouchers of the aforesaid Dock Contractor Company; and in that re-

spect at least, it is extremely doubtful as to whether or not the Public Service Commission has the legal right to continue to withhold its approval of vouchers for work done by the said Dock Contractor Company pursuant to its contract, in order to establish a situation whereby it can be said with any degree of seriousness that the
104 Public Service Commission is now threatening to cancel the contract of the said Dock Contractor Company, and is withholding its funds in order to make such action, on the part of the Public Service Commission, a proper basis for injunctive relief so far as this action brought by this taxpayer is concerned.

Deponent further desires to call to the attention of the Court, the fact that while it is stated in the moving papers as a basis of a suggestion that this great public work cannot go on because of the inability of the contractors performing the same to comply with the law, that the falsity of such a statement must become evident and apparent upon the affidavit quoted herein signed by the vice-president and general manager of a contractor who is actually doing this work, and doing it in compliance with the law. Deponent further says that on the 27th of November, 1914, he caused to be filed in the office of the Public Service Commission, a complaint against the Underpinning & Foundation Company, which said company is engaged in doing certain construction work on the subway in the neighborhood of Canal street and Broadway, and in the neighborhood of Bleecker street and Broadway, in the Borough of Manhattan, City of New York; that deponent is informed and verily believes and it is a matter of record to the Public Service Commission, that the said Underpinning & Foundation Company is a sub-contractor of the said Dock Contractor Company with reference to the subway which is being done in the neighborhood of Bleecker street and Broadway, and that as such sub-contractor, the Public Service Commission has no authority over said sub-contractor or the moneys of said sub-contractor which are paid directly by the said Dock Con-
105 tractor Company to the said Underpinning & Foundation Company; that at a public hearing heretofore referred to, Chairman Edward E. McCall, of the Public Service Commission, stated that the Commission would not hold up the funds of the Dock Contractor Company, nor would it invalidate its contract upon evidence of the fact presented at that hearing that servants of the Underpinning & Foundation Company doing work under its sub-contract in the section of the said Dock Contractor Company, were aliens, by reason of the fact that no evidence was presented showing that the said general contractor had notice that its sub-contractor was violating the law, by reason of the fact that the courts in this state have held that in cases where sub-contractors are violating the law, notice of such fact must be brought home to the general contractor in order to warrant one contracting party to declare the contract void.

Deponent further says that in the complaint filed by him with the Public Service Commission on November 27th, 1914, no specification of fact is set forth in order to apprise the Public Service Commission that the said Underpinning & Foundation Company is violating the law as a general contractor, in order to justify the Public Service

Commission in refusing to certify vouchers for any work done by the Underpinning & Foundation Company by reason of the fact that the complaint filed by deponent was not verified, and so far as deponent knows, there is no evidence before the Public Service Commission wherein it appears that the Underpinning & Foundation Company is violating the law in any other respect, except as a sub-
contractor, unless the statement of fact that the violation
106 occurred in the vicinity of Canal street covers a portion of the
work performed by the Underpinning & Foundation Company as a general contractor. Deponent further says that in all hearings before the Public Service Commission that the Commission has usually required proof by sworn testimony of violations before officially acting in refusing to certify vouchers, and therefore deponent verily believes that the evidence laid before this Court with reference to threats by the Public Service Commission is not ample or sufficient in order to justify the issuance of an injunction based upon threats on the part of the Public Service Commission that they are about to commit an irreparable act *of* wrong, or to declare a contract void.

That deponent knows of no other proceeding before the Public Service Commission relating to the employment of alien labor upon the subways, than the proceedings hereinbefore referred to. Deponent further says that in the instance of the withdrawal of the complaint of the Dock Contractor Company, that a consultation was held in the office of the Public Service Commission on Wednesday, November 25th, between Chairman Edward E. McCall and W. H. K. Olcott, attorney for the Dock Contractor Company, and W. V. McMenimen, Vice-President and General Manager of the Dock Contractor Company, and deponent and his attorney, wherein it was stated by Chairman Edward E. McCall to deponent and to the aforesaid persons, that in the event that deponent withdrew his complaint against the Dock Contractor Company, that he would certify their vouchers, but that he could not do that until the complaint was with-
drawn, and that the reason why deponent filed the aforesaid
107 withdrawal was pursuant to said agreement and said conference, in order that the Dock Contractor Company should not be financially embarrassed in carrying on their work, and in order that they might be able to pay their sub-contractors and their employees.

Deponent further says that he has investigated the conditions under which the subway work is being done with reference to alien labor, and that he has discovered as a result of his investigations, that the contractors doing the said work are discriminating against American citizens; that he attaches hereto an affidavit of one Robert R. Dutcher, an American citizen whose ancestors settled in America in 1626, competent in every way, and who was discharged by Cranford & Company, a general contractor engaged in constructing Section 1 and Section 1*a* of the Fourth Avenue Subway in the Borough of Brooklyn, City of New York. That since the newspapers have published accounts of deponent's proceedings before the Public Service Commission, deponent has received no less than one hundred communica-

tions both personally and by letter, from various American citizens who had applied for work upon the subways and who stated that they were willing to work for the wages paid them by the contractors, but that many of them were refused work, and still others were put to work and kept at work for two or three hours and summarily discharged against their protest, and without any reason being given therefor, although at the time the contractors were actually hiring men, principally aliens, to do the work that the discharged men were hired to do; that after these men were discharged, and these are only a small number of a great number who suffered similar experiences, the contractors stated publicly that American citizens were not physically able and did not possess the skill or ability to do this work, a statement which is a slander upon the honesty, the physique and the ability of the American workingman; that any statement made in the moving papers, or any suggestion that the contractors cannot obtain a sufficient number of American citizens with qualifications to do the work required in the construction of our great subways, is false; that deponent has attached hereto, affidavits by affiants with knowledge of labor conditions in the City of New York, which show beyond question, that at the present time and prior to the beginning of this action, there are thousands of American citizens, both mechanics and laborers, who are at the present time unemployed and who are able and willing to work.

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Deponent verily believes that the only difficulty that the contractors have in complying with Section 14 of the Labor Law, is that they are able to secure aliens, who, because of their standards of living in the City of New York, can afford to work for 20 cents an hour, or $1.60 a day, whilst American citizens who have families dependent upon them for support, require at least 25 cents an hour, or $2.00 a day for the bare necessities of life.

Deponent further says that the suggestion in the moving affidavits and the moving papers, and indeed, the statement of fact, that the contractors engaged in the subway construction work based their bids upon the supposition that aliens would be employed on the subways constitutes a statement to the effect that in making these contracts, containing, as they do, express provisions requiring compliance with the Labor Law, that the contractors, if the plaintiff in this action has the authority to speak for them, deliberately planned to violate the law.

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Deponent further says that if the contractors made contracts and based their estimates thereon, as stated by the affiant Moore in the moving papers, with the intention of violating the law, that they bring themselves squarely under the equitable maxim, "That those who come into a court of equity, must come in with clean hands." Deponent submits, therefore, that this action and the affidavits in the moving papers are therefore based upon a deliberate statement that the contractors are violating the law and intended to violate the law at the time they agreed to comply with it in their contracts, therefore, placing them in a position of defying the law which is a mandate of the people. Deponent respectfully submits to this Court that the contractors, that is to say, the Dock Contractor Company and the

Underpinning & Foundation Company who are most interested and concerned in this litigation, are not in any sense a party to it, but that on the contrary, as appears by the affidavit of Mr. McMenimen hereinbefore quoted, that the only contractor against whom deponent proceeded stated to the Commission, and indeed for the benefit of this Court, that it is complying with the law and has been doing so on its contract at least since November 7th, 1914, and agreed to continue to do so in the future; that no affidavit on the part of any representative of the Underpinning & Foundation Company claiming damage to them by reason of any action on the part of the Public Service Commission has been filed as part of the moving papers.

Deponent further says that no sufficient statement of fact
110 to justify the issuance of an injunction has been made in the moving papers, and that therefore the statement of the plaintiff as a taxpayer, based, as it is, upon the making of contracts with the intention to violate them, and also to violate Section 14 of the Labor Law, basing his right in this Court solely upon public considerations, is entirely inadequate for the purpose of issuing an injunction against public officers charged with the duty of enforcing a law as the representative of the people.

Deponent, in the event that the Court decides that this suit is properly brought and that there are sufficient facts before the Court upon which to justify the issuance of an injunction, submits to this Court that the injunction should be vacated upon the following grounds:

1st. That it appears from the moving papers that the treaties with Italy cited therein, do not either expressly or impliedly prohibit the sovereign State of New York from enacting legislation in the interest of American citizens.

2nd. That Section 14 of the Labor Law does not either expressly or impliedly discriminate against citizens of the United States within the meaning of the Constitution of the United States.

3d. That in the event that the Court should be of the opinion that the treaty with Italy by implication or expressly prohibits discrimination against aliens in the matter of public works, that in that event, said treaty is unconstitutional and void, that is — say, contrary to the Constitution of the United States and the constitutional rights of the sovereign State of New York.

111 4th. That Section 14 of the Labor Law does not impair contractual obligations, in that the sovereign State of New York has the same right as any private individual in the selection of its employees, to decide and to say who shall be its employees.

5th. That the contractors and no citizen in the interest of the contractors or representing the contractors, can contend that their constitutional rights have been invaded with reference to right to contract, after they have consented to perform their contract in accordance with Section 14 of the Labor Law, but that on the contary, the Court would be doing an unconstitutional act in forbidding the enforcement and compliance of a public contract in the interest of a taxpayer or even a contractor, whereby in order to do so, it

must declare the provision void, contrary to existing contracts and to the express intentions of the contracting parties.

6th. That the sovereign State of New York in the exercise of its police power, has the right to impose upon those making contracts for public work, a provision to prefer citizens of the State of New York primarily, and citizens of the United States secondarily in the exercise of its police power, in order to prevent citizens of the State of New York primarily, and citizens of the United States secondarily, and their dependents, from becoming public charges, and in order to carry out for the benefit of its citizens primarily and citizens of the United States secondarily, the object of all gov-
112 ernment, and particularly the object of the Government of the United States, to wit: The happiness and prosperity of its citizens.

7th. That the sovereign State of New York in the exercise of its police power, and for the better security of the state and national government, has the right as an employer in the selection of its employees to discriminate against aliens for the apparent purpose of offering said aliens inducements to become citizens of the United States and of the State of New York, by creating greater opportunities for labor and prosperity as citizens of the State of New York and of the United States, in order to discourage emigration or the removal by aliens of resources collected in the United States to foreign lands.

8th. That the sovereign State of New York in the exercise of its police power, and for the protection of great public works, has the right to discriminate against aliens and in favor of citizens of the State of New York and the United States, for the purpose of securing friendly employees, and of preventing alien employees who may or may not be enemies to American institutions, and therefore disinterested in performing their work well, or interested in performing it improperly, or for the purpose of destroying public work, by reason of enmity to American institutions. That a sovereign government has the right in the exercise of its police power to select its citizens for public work whether that work consists of subways, or making guns or gun powder for use in war, upon the theory that greater dependence can be placed in the performance of such work upon citizens rather than upon aliens, and in order to pre-
113 vent aliens in order to weaken our government and its institutions and its great public works, from being placed in a position where they could destroy them.

9th. That the sovereign State of New York in the exercise of its police power, has the right to place all public work under the civil service if it so desires, in order to guarantee and insure that all public work shall be performed by citizens of the State, or citizens of the United States, and that this exercise of police power and of sovereign right of government, can be carried out by means of civil service laws under the jurisdiction of a State civil service board and administrative heads of government, or by control exercised by the State over the Public Service Commission and other administrative, State or municipal bodies, by compelling these administrative of-

ficers to insert in all contracts made by them, provisions for the employment of residents of the State, or citizens of the United States; that the only difference in the exercise of the sovereign power of the State of New York with relation to employees under the civil service, and with relation to men employed upon public work, is that under civil service, competitive examinations or certain regulations are prescribed, while in this particular instance, no examinations or no regulations are prescribed, except such laws which require the Public Service Commission to make the labor laws a part of all contracts, thereby permitting the contractors as agents of the Public Service Commission to hire men without the formality of examinations or regulations, except that they must be pri-
114 marily citizens of the State of New York, and secondarily citizens of the United States, with the exception that the law requires the contractors to keep a record of their employees, whether they are native or naturalized, and if naturalized, the date of naturalization and the court out of which such papers were issued.

JOHN GILL.

Sworn to before me this 3rd day of December, 1914.

R. FRANK THOMPSON,
Commissioner of Deeds, New York City.

115 *Affidavit of John Gill; Read in Behalf of Amicus Curiae.*

Supreme Court, New York County.

WILLIAM HEIM, Plaintiff,
versus
EDWARD E. MCCALL et al., etc., Defendants.

CITY AND STATE OF NEW YORK,
County of New York, ss:

John Gill, being duly sworn, deposes and says, that supplementing the facts stated in the affidavit made by him and filed herewith, he affirms that he interviewed Mr. Sears, head of the Municipal Employment Bureau, with the object of ascertaining the number of citizens unemployed who had applied at the Municipal Employment Bureau for work, and that said Sears told deponent that three thousand American citizens had applied for labor work and stated that they were unemployed; and deponent further says that the said Sears informed deponent that, upon reasonable notice, he could furnish to the contractors at least twenty-five thousand American citizens able, ready and willing to do labor work upon the subway now in the course of construction in the City of New York.

Deponent further says that at the present time in the City
116 of New York, there is a great depression in building and construction work, and that practically the only work which is now under construction is the subway work; that he has made investigations and inquiries about the conditions under which aliens

are employed, and that he has been informed and verily believes that they are employed by padrones who furnish men in large quantities to contractors for a consideration, and that the consideration is usually paid by the men at a certain amount per week. That these padrones have arrangements with foremen in the employ of the subway contractors, whereby only men carrying certain slips shall be put to work or shall be kept at work; that when men apply and are put to work who do not carry this slip, they are usually laid off within a very short time after they begin work for no just cause; that deponent is familiar with the conditions under which these aliens live, by reason of the fact that he has caused investigations to be made, under his direction, by men familiar with the conditions and the places of living of these aliens, and that he has found as a result of his investigations that at least 75% of the aliens employed upon our public work are men who are sojourning in the country only so long as they can obtain employment and who have left their families and dependents in foreign countries with the result that, when the aliens are thrown out of work, their dependents do not suffer, at least in the United States, and that if unable to obtain work they usually return to their native land with their savings and with resources earned in the United States.

Deponent further says that there is no prohibition, under
117 the laws of the State of New York, which prevents aliens from being employed upon private work, and that, therefore, means of livelihood is not taken from aliens in the United States or in the State of New York, when they are prevented by law from working upon public work.

Deponent further says that, as a result of his knowledge of conditions with regard to labor in the State of New York, he has observed that private employers of labor prefer American citizens to do labor and mechanical work whenever they can be secured, by reason of the fact that they do better work, making it more profitable in the end, even though they are paid higher wages, to employ them, thereby indicating the fact that the State of New York, in selecting its citizens to do its work, is acting as an employer not only to the best interests of its citizens, but also for the best interests and the best workmanship of the particular work in which it is engaged.

JOHN GILL.

Sworn to before me this 4th day of December, 1914.

R. FRANK THOMPSON,
Commissioner of Deeds, New York City.

118 *Affidavit of Roswell D. Tompkins; Read in Behalf of Amicus Curiæ.*

Supreme Court, New York County.

WILLIAM HEIM, Plaintiff,
vs.
EDWARD E. MCCALL et al., etc., Defendants.

STATE, CITY, AND COUNTY OF NEW YORK, *ss:*

Roswell D. Tompkins, being duly sworn, deposes and says that he is the Secretary of the United Board of Business Agents of the Building Trades of Greater New York and vicinity, which is composed of allied organizations making up practically the entire construction work and building industry in the City of Greater New York, comprising approximately one hundred thousand men; that deponent is familiar and has been familiar during the past ten years and longer, with labor conditions in the City of New York and vicinity, relating to construction work of all kinds and mechanics engaged therein, and that he has been informed that certain statements have been made in the above entitled action to the effect that at the present time, and while the subways have
119 been under construction, that there are not a sufficient number of American citizens skilled in mechanics and labor work to supply the demand for mechanics and laborers upon the subways now in the course of construction in the City of New York, and that he is in a position to know and to state with authority and with knowledge of the conditions, that such statements are false, and that on the contrary there is now and there has been since the subway work began, an abundance of mechanics and laborers who are American citizens to do such work. Deponent further says that in order to indicate the gross falsity of this statement which has been apparently made for the purpose of deceiving the Court as to the actual conditions which exist, that there are now unemployed mechanics in the City of New York, American citizens not only able, competent, but anxious and eager to do any mechanical work which they are called upon to do, approximately thirty-five thousand men. That these men invariably have families, large and small, dependent upon them for support, and that as a result of their inability to obtain work on the subway and other public work in and about the City of New York, which is practically the only work going on at the present time, that their families and dependents are in destitute circumstances, and in a great many cases have become or must surely become public charges.

Deponent further says that he is fairly familiar with the alien question so-called, which has been recently raised with regard to subway work, and that he can truly say that these aliens are usually imported into the country by padrones in the interest of contractors and supplied to contractors in large quantities who by reason
120 of the existence of the padrone system are better able to keep the men under control, and that these aliens have invari-

ably, when they are men of families, left their families behind them in foreign countries, so that when they are out of employment, if they ever happen to be, their families are not left dependent upon the State of New York or the United States, such as are the families of American citizens whose bread earners are out of employment.

Deponent therefore begs to assure the Court in the interest of organized labor, and in the interest of American citizens and their families dependent upon them, and in the interest of American standards of living which organized labor has been trying to build up for the past twenty-five years in this country, that the suggestion in the moving papers in this action that in the event that the contractors shall in the future be compelled to hire American citizens, that there will be a great waste of public funds by reason of the advance in wages which will necessarily have to be made in order to pay American labormen the standard of wages in order that they may live up to American standards, is more than offset by the demands upon taxpayers which are being made now and which must in the future continue to be made under present conditions, by reason of the fact that the families and dependents of American citizens who reside in the State of New York and United States, must of necessity become public charges, and that, indeed, the moneys which must be spent by the taxpayers to pay an increase of wages will be, and is small and insignificant compared
121 to the larger amount which must be expended to take care of those dependent upon the work and the earnings of the American workingman.

ROSWELL D. TOMPKINS.

Sworn to before me this 3rd day of December, 1914.
R. FRANK THOMPSON,
Commissioner of Deeds, New York City.

122 *Affidavit of Thomas A. Lyons; Read in Behalf of Amicus Curiæ.*

Supreme Court, New York County.

WILLIAM HEIM, Plaintiff,
versus
EDWARD E. MCCALL et al., etc., Defendants.

CITY AND STATE OF NEW YORK,
County of New York, ss:

Thomas A. Lyons, being duly sworn, deposes and says that he interviewed Roswell D. Tompkins, Secretary of the Board of Business Agents whose affidavit is attached hereto; that the said affidavit was prepared and compiled too late to incorporate further facts therein, and that the said Tompkins stated to deponent that his organization, by correspondence filed with the Public Service Commission at least two years ago, raised the question of the employ-

ment of aliens upon the subways in the course of construction, and objected thereto; but that they were denied a hearing, or rather such a hearing as would enable them to present such violations fully; that this statement is made in order to controvert the statement in the moving papers that this question was not raised until about ten days ago.

THOMAS A. LYONS.

Sworn to before me this 4th day of December, 1914.
R. FRANK THOMPSON,
Commissioner of Deeds, New York City.

123 *Affidavit of Robert R. Dutcher; Read in Behalf of Amicus Curiæ.*

Supreme Court, New York County.

WILLIAM E. HEIM, Plaintiff,
vs.
EDWARD E. MCCALL et al., etc., Defendants.

STATE, CITY, AND COUNTY OF NEW YORK, *ss:*

Robert R. Dutcher, being duly sworn, deposes and says: That he is 31 years of age, and resides at Shore road and Seventy-ninth street, in the Borough of Brooklyn, City of New York; that he was born at Lynbrook, Long Island, State of New York, 31 years ago, and is a direct lineal descendant of Dierck Cornellessen Dyster, who settled at Fort Orange, now Albany in the year 1626.

Deponent further says that he is six feet tall, and weighs approximately 190 pounds, and is by occupation an expert in tunnel work, that is to say as timber man, shorer, and even bridge and structural steel work, that he has been employed as such for 12 years; that he is married and has a wife and one child depending on him for support; that on November 24th, 1914, he applied for a position as timber man to the Cranford Company, now engaged in constructing Section I of the new Fourth Avenue Subway, in the Borough of Brooklyn, City of New York, where it was asserted that American citizens were wanted for work; that he applied at
124 Flatbush avenue and Sixth avenue, where the shanty of the Company is located, and that he received a card with #1008, putting him to work; that he worked there for two days, and without cause and against his protest, was discharged, together with a helper, who was also an American citizen and who also protested against his discharge, and who also had a family dependent on him for support; that those in authority over deponent assured him his work was very satisfactory.

That at the time that deponent was discharged, there were signs still upon the Company's buildings to the effect that men were wanted for work, and that at the time of the discharge, there was plenty of work for deponent to do.

Deponent further says that he agreed to work for the wages offered by the Company, which were 30 cents an hour, and that there was no reason why he should be discharged, except that on the following day, representatives of the Company stated to the public press that they had endeavored to secure American citizens to do the work, but that American citizens could not and would not do it, and that they were not sufficiently skilled or hardened to the work, and that, therefore, they were compelled to employ foreigners, all of which statements were false and made with the apparent motive of influencing the public to the belief that American citizens could not and would not do such work.

ROBERT R. DUTCHER.

Sworn to before me this 3d day of December, 1914.

R. FRANK THOMPSON,
Commissioner of Deeds, New York City.

125 *Opinion of the Court at Special Term.*

HEIM
vs.
MCCALL.

NEWBURGER, *J.*:

This is an application to restrain the defendants, constituting the Public Service Commission, from forfeiting contracts made by them with certain contractors for the building of portions of the new subway lines in this city. The plaintiff brings this action as a taxpayer, claiming that the threatened action will result in great loss to the city. It is unnecessary at this time to refer to the history of the legislation and negotiations that resulted in the defendants finally awarding a number of contracts for the building of the new subways. In all of such contracts it was provided that the contractor would comply with the requirements of Section 14 of the Labor Law, and on a failure to do so the contract should be void. Not only is this a part of the contract, but is contained in the invitation to bidders. All of such contracts are being performed. It appears that each of the contractors has employed and now employs large numbers of laborers and mechanics residents of the city, but who are not citizens of the United States or State of New York, but are subjects of the King of Italy. It being conceded that under the contracts the defendants have the power to declare the same void upon the failure of a contractor to carry out its terms, the court is asked to determine in this proceeding the constitutionality of section 14 of the Labor Law. This section provides that: In the construction of public works by the State or a municipality, or by persons contracting with the State or such municipality, only citizens of the United States shall be employed; and in all cases where laborers are em-
126 ployed on any such public works preference shall be given citizens of the State of New York. In each contract for the construction of public works a provision shall be inserted to

the effect that if the provisions of this section are not complied with the contract shall be void. The objection by the plaintiff that the statute cannot be enforced against the contractors because by the provisions of the Rapid Transit Act of 1892, and the amendment permitting the making of the contracts with the Interborough Company and the New York Municipal Railway Corporation, whereby the said corporations contributed towards the building of the subways, made them contracts for construction by private corporations, is, in my opinion, untenable. As was said by Mr. Justice Harlan in Atkin vs. State of Kansas (191 U. S. Rep., 222): "Whether done by the State directly or by one of its instrumentalities, the work was of a public, not private, character." It is further claimed that the provisions of the Labor Law in regard to the employment of aliens were not only unconstitutional, but were in violation of treaty rights, as it restricted the field of labor of such foreigners. I do not think that the cases cited pass upon this question. As was said by Chief Justice Cullen in People vs. Orange County Road Const. Co. (175 N. Y., 84): "If the State itself prosecutes a work it may dictate every detail of the service required in its performance; prescribe the wages of workmen, their hours of labor, and the particular individuals who may be employed. No such right exists where it has let out the performance of the work to a contractor unless it is reserved by the contract." In this case the contract reserved the right in the city to compel the enforcement of the provision of the Labor Law as
127 to the individuals the contractors were to employ. As was also said by Mr. Justice Harlan in Atkin vs. State of Kansas (at pp. 222, 223): "It cannot be deemed a part of the liberty of any contractor that he be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the State. On the contrary, it belongs to the State, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf or on behalf of its municipalities. No court has authority to review its action in that respect. Regulations on this subject suggest only considerations of public policy; and with such considerations the courts have no concern." I have examined the cases cited on the briefs submitted, and while most of them refer to the right to limit the hours of labor, yet the same reasoning must of necessity apply to the question of the right of the Legislature to provide what laborers shall be employed upon public works. The contractors had full knowledge of what was required of them, and in making their estimates knew that they were compelled only to employ citizens. Can it be said that the position taken by the State differs from that of an individual who provides a certain test in determining the class of persons to employ as preferring persons over or under certain ages to others. If, therefore, the State has the same right in conducting its business that an individual has, it seems to me that the Legislature had a perfect right to enact Section 14 of the Labor Law, and it does not violate any rights of any alien under the existing treaties. Where a statute admits of two constructions, one of which will make

the act in violation of the constitution and by the other of
128 which the act can be sustained as a proper exercise of legislative power, that construction should be given which assumes that the Legislature was mindful of its constitutional limitations and passed a constitutional and not an unconstitutional act (see People vs. Ringe, 197 N. Y. Rep., at page 150). For these reasons the demurrer interposed must be sustained and the application for an injunction pendente lite must be denied. Settle order on notice. The order may provide for a stay pending an appeal.

129 *Stipulation Waiving Certification.*

It is hereby stipulated, that the foregoing are true and correct copies of the following original papers herein: the notice of appeal, the decision, the judgment appealed from, the order appealed from, the order to show cause, the summons, amended complaint, affidavit of plaintiff, affidavit of Ernest C. Moore, affidavit of John S. Russell, two affidavits of Thomas E. O'Brien, two affidavits of John Gill, affidavit of Roswell D. Tompkins, affidavit of Thomas A. Lyons, affidavit of Robert R. Dutcher, demurrer to the amended complaint, and the opinion of Hon. Joseph E. Newburger, a Justice of this Court, sustaining the demurrer and denying the motion of plaintiff for an injunction pendente lite, and of the whole thereof, and that the said summons, amended complaint and demurrer are the papers and all the papers, upon which the said Justice Newburger made the said decision upon which the judgment appealed from was entered, and that the said order to show cause, summons, amended complaint, demurrer, affidavits and opinion are the papers, and all the papers, upon which the said Justice Newburger made the order appealed from; and certification thereof as required by Section 1353 of the Code of Civil Procedure or otherwise is hereby waived.

Dated, December 14, 1914.

THOMAS F. CONWAY,
Attorney for Plaintiff-Respondent.
GEORGE S. COLEMAN,
Attorney for Defendants-Respondents, Constituting the Public Service Commission for the First District of New York.
GROUT & GROUT,
Attorneys for Defendants-Respondents, Cranford Company and Flinn-O'Rourke Company, Inc.

130 *Order of Appellate Division Appealed From.*

At a Term of the Appellate Division of the Supreme Court in and for the First Department, Held at its Court-house, in the County of New York, on the 31st Day of December, 1914.

Present:

Hon. George L. Ingraham, Presiding Justice.
" Chester B. McLaughlin,
" Francis M. Scott,
" Victor J. Dowling,
" Henry D. Hotchkiss,
Associate Justices.

WILLIAM E. HEIM, Plaintiff-Appellant,
against
EDWARD E. MCCALL, MILO R. MALTBIE, J. SERGEANT CRAM, GEORGE V. S. WILLIAMS, and Robert C. Wood, as Members of and Constituting the Public Service Commission for the First District of the State of New York, Defendants-Respondents,
and
CRANFORD COMPANY and FLINN-O'ROURKE COMPANY, Inc., Defendants-Appellants.

Order of Reversal.

131 The above named plaintiff having appealed to the Appellate Division of the Supreme Court in and for the First Department from the judgment herein entered and filed in the office of the Clerk of the County of New York on the 12th day of December, 1914, whereby it was adjudged that the demurrer to the amended complaint herein, be sustained and the said amended complaint dismissed, and the said plaintiff having also appealed from the order entered in the same Clerk's office on the same day denying the plaintiff's motion for an injunction pendente lite herein; and the defendants Cranford Company and Flinn-O'Rourke Company, Inc., having also appealed from the same judgment and order, and the said appeals having come on to be heard;

Now, after hearing Thomas F. Conway, Esq., of counsel for the plaintiff-appellant in support of plaintiff's appeal, Edward M. Grout, Esq., of counsel for the defendants-appellants, in support of their appeal and George S. Coleman, Esq., of counsel for the defendants-respondents and Jeremiah A. O'Leary, Esq., as amicus curiæ, in opposition, and due deliberation having been had;

Now, on motion of Thomas F. Conway, attorney for plaintiff-appellant, it is unanimously

Ordered, That the judgment and order so appealed from, and each and both of them, be and the same hereby are reversed, with costs to the plaintiff-appellant, and that plaintiff have judgment

overruling the demurrer to the amended complaint, with costs, and for the relief demanded in the amended complaint, viz:

(1) Restraining and enjoining the Public Service Commission for the First District of the State of New York, and the mem-
132 bers thereof, and each and all of them, their deputies, clerks, agents, attorneys and assistants, from declaring any of the contracts mentioned in the said amended complaint and Schedule "A" thereto attached void or forfeited because of the employment of laborers who are not citizens of the United States and who are not citizens of the State of New York, as specified in the said amended complaint; and

(2) Restraining and enjoining said Public Service Commission and the members thereof, from refusing and omitting to prepare and certify vouchers for eighty-five (85) or ninety (90) per cent of the amounts stated in the monthly estimates made and certified in writing to the said Commission by its Chief Engineer for work done under said contracts in accordance with the practice heretofore followed, as set forth in said amended complaint and as provided for in the said contracts.

G. L. I., *P. J.*

133 *Judgment Appealed From.*

Supreme Court, New York County.

WILLIAM E. HEIM, Plaintiff,
against
EDWARD E. MCCALL, MILO R. MALTBIE, J. SERGEANT CRAM, GEORGE V. S. WILLIAMS, and Robert C. Wood, as Members of and Constituting the Public Service Commission for the First District of the State of New York; Cranford Company and Flinn O'Rourke Company, Inc., Defendants.

Judgment.

The above named plaintiff having appealed to the Appellate Division of the Supreme Court in and for the First Department from the judgment herein entered and filed in the office of the Clerk of the County of New York on the 12th day of December, 1914, whereby it was adjudged that the demurrer to the amended complaint herein be sustained and the said amended complaint dismissed, and the said plaintiff having also appealed from the order entered in the same clerk's office on the same day denying the plaintiff's motion for an injunction pendente lite herein; and the defend-
134 ants Cranford Company and Flinn-O'Rourke Company, Inc., having also appealed from the same judgment and order, and the said appeals having duly come on to be heard and the said Appellate Division having by an order made and entered herein, directed said judgment and said order to be reversed with costs to the plaintiff, and that plaintiff have judgment overruling the de-

murrer to the amended complaint with costs, and for the relief demanded in the amended complaint; and the plaintiff's costs having been duly taxed at Three hundred ninety-four and 65/100 dollars ($394.65);

Now, on motion of Thomas F. Conway, attorney for the plaintiff, is is

Ordered and adjudged, That the judgment so appealed from as aforesaid be, and the same hereby is, reversed.

And it is further ordered and adjudged, That the demurrer to the amended complaint herein be, and the same hereby is, overruled and that the plaintiff, William E. Heim, recover from the defendants herein Edward E. McCall, Milo R. Maltbie, J. Sergeant Cram, George V. S. Williams and Robert C. Wood, as Members of and Constituting the Public Service Commission for the First District of the State of New York Three hundred ninety-four 65/100 dollars ($394.65) his costs as taxed, and that he have execution therefor.

And it is further ordered and adjudged:

(1) That the Public Service Commission for the First District of the State of New York, and the members thereof, and each and all of them, their deputies, clerks, agents, attorneys and assist-
135 ants, be restrained and enjoined from declaring any of the contracts mentioned in the said amended complaint, and Schedule "A" thereto attached (the description of said contracts in said Schedule "A" being deemed and hereby made a part hereof) void or forfeited because of the employment of laborers who are not citizens of the United States and who are not citizens of the State of New York, as specified in the said amended complaint; and

(2) That the said Public Service Commission, and the members thereof, be enjoined and restrained from refusing and omitting to prepare and certify vouchers for eighty-five (85) or ninety (90) per cent of the amounts stated in the monthly estimates made and certified in writing to the said Commission by its Chief Engineer for work done under said contracts in accordance with the practice heretofore followed, as set forth in said amended complaint and as provided for in the said contracts.

Dated, January 8, 1915.

WILLIAM F. SCHNEIDER, *Clerk.*

136 *Opinion of the Appellate Division Concurred in by all the Justices.*

Supreme Court, Appellate Division, First Department, December, 1914.

George L. Ingraham, P. J.
Chester B. McLaughlin,
Francis M. Scott,
Victor J. Dowling,
Henry D. Hotchkiss, JJ.

No. 6654.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
vs.
CLARENCE A. CRANE, Defendant-Appellant.

No. 6655.

WILLIAM HEIM, Plaintiff-Appellant,
vs.
EDWARD E. MCCALL et al., etc., Defendants-Respondents; CRANFORD COMPANY et al., Defendants-Appellants.

Appeal from Judgment of Conviction for a Misdemeanor,
137 and also Appeal from a Judgment Overruling a Demurrer to the Complaint in a Civil Action.

Edward M. Grout, for appellant Clarence A. Crane.
Robert S. Johnstone, for respondent People of the State.
Thomas F. Conway, for appellant Heim.
Edward M. Grout, for appellants Cranford Company et al.
George S. Coleman, for respondents Public Service Commission.
Jeremiah A. O'Leary, for John Gill amicus curiæ.

SCOTT, *J.*:

Both of these appeals call in question the validity of the same statute. They were argued at the same time and can be conveniently considered together. The statute to which our consideration is thus invited is that portion of Section 14 of the Labor Law which reads as follows: "In the construction of public works by the State or a Municipality or by persons contracting with the State or such Municipality, only citizens of the United States shall be employed; and in all cases where laborers are employed on any such public work, preference shall be given citizens of the State of New York." A violation of this act is made a misdemeanor, and it is provided that in all contracts for the construction of public works a provision shall be inserted to the effect that, if the provisions of this section are not complied with, the contract shall be void.

The appellant Clarence A. Crane was convicted of a misdemeanor for violation of the Statute in that he employed aliens as laborers in the performance of a contract executed by the President of
138 the Borough of Manhattan for the construction of a catch basin in connection with the public sewer system. The appellant William E. Heim sues as a Taxpayer to restrain the Public Service Commission, First District, from forfeiting or declaring void a large number of contracts, now in course of performance, for the construction of the Rapid Transit Subways in the City of New York, because of the employment (which is admitted) of laborers who are not citizens of the United States, and who are not citizens of the State of New York. As justification for his actions this appellant alleges that the forfeiture of these contracts would result in irreparable loss and damage to the City of New York and the taxpayers thereof, and he states at some length his reasons for this allegation. Certain contractors, holding contracts for the work referred to are made parties defendant, and while they do not appear to have served any pleadings, they unite in asking that relief be granted as demanded by the appellant Heim.

With regard to the last mentioned appeal we are not unmindful of the recent expressions of the Court of Appeals adverse to the maintenance of so-called taxpayers' actions to test the validity of legislative acts (Schieffelin vs. Komfort, 212 N. Y., 520). In the present case however this objection is not raised by the respondents, and since it is represented to us that the matter is one of great public exigency, as to which all parties interested seem to desire a speedy determination, we have concluded to pass upon the appeal upon its merits.

The particular provision of the act above quoted which has been discussed at bar is that which forbids the employment by
139 persons engaged in the performance of work, under contracts with the State or a Municipality, of any except citizens of the United States, and it is that feature of the act to which we shall direct our attention, and we shall commence our discussion by conceding, as is strongly urged upon us by the respondents, that the invalidity of an act of the Legislature is not to be lightly declared, and that in order to find such an Act invalid upon Constitutional grounds some definite provision must be found in the fundamental and paramount law with which the questioned enactment is at variance.

The specific Constitutional provision which is claimed to have been violated by the act in question is that portion of the Fourteenth Amendment of the Constitution of the United States which reads as follows: "No State shall make or enforce any law which shall abridge the privileges and immunities of the citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law." It is settled law that the amendment is not confined to the protection of citizens, but that its provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences

of race, or color or of nationality, and the promise of the equal protection of the laws is equivalent to a pledge of the protection of equal laws (Yick Wo vs. Hopkins, 118 U. S., 369). The rights thus secured to resident aliens, as well as to citizens, have been repeatedly held to extend to the right to contract, to pursue lawful callings, and to follow ordinary avocations, that no impediments should be interposed to the pursuits of any one, except such
140 as are applied to the same pursuits by others under like circumstances (Barbier vs. Connelly, 113 U. S., 27). It was said by the same Court in Missouri vs. Lewis (101 U. S., 22), that: "No person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or class in the same place and under like circumstances," and again in Hayes vs. Missouri (120 U. S., 68): "The Fourteenth Amendment requires that all persons subject to legislation limited as to the objects to which it is directed, or by the territory within which it is to operate, shall be treated alike under like circumstances and considerations both in the privileges conferred and in the limitations imposed." Hence it may be said to be as firmly established as is any principle of Constitutional law that one of the purposes and effects of the Fourteenth Amendment of the Federal Constitution was to forbid discrimination by any state between citizen and resident aliens, based solely upon the fact of alienage and non-alienage so far as concerns the right to enjoy life, liberty and the pursuit of happiness, and the equal protection of the laws. Among the rights guaranteed to every individual, is that of freely contracting to render service and perform labor. "The provisions of the State and of the Federal Constitutions protect every citizen in the right to pursue any lawful employment in a lawful manner. He enjoys the uttermost freedom to pursue his chosen pursuit and any arbitrary distinction against or deprivation of that freedom by the legislature is an invasion of the Constitutional guarantee" (People vs. Williams, 189 N. Y., 13).

That the statutory provision now under consideration is
141 frankly and baldly discriminatory requires no argument to establish. It forbids the employment of aliens upon all public works within the State for no other reason than that they are aliens. On its face it appears to be directly in conflict with the Fourteenth Amendment, but it is strenuously argued by the respondents that, for various reasons, it does not, in truth, conflict with the Constitutional prohibition.

Much stress is laid by all of the respondents upon the cases which have upheld laws restricting the hours of labor and prescribing the rate of wages to be paid on public work, of which Atkin vs. State of Kansas (191 U. S., 207), is the leading case. We have been referred to and have examined many cases in this and other States dealing with that question, but we find it unnecessary to cite or comment upon them here because they all rest upon quite different considerations from those which we understand to be controlling upon the precise question we are now discussing. In none of them was the question of discrimination involved in the sense in which it is involved here. This was clearly pointed out by Mr. Justice

Harlan who wrote for the Court in Atkin vs. Kansas, supra. He said: "Equally without any foundation upon which to rest is the proposition that the Kansas Statute denied to the defendant" (a contractor, not a laborer) "or to his employee the equal protection of the law. The rule of conduct prescribed by it applies alike to all who contract to do work in behalf of the State or of its Municipal subdivisions, and alike to all employed to perform labor in such work."

So in People ex rel. Rodgers vs. Coler (166 N. Y., 1), wherein the Court of Appeals considered a Statute of the State regulating the hours of labor and the rate of wages on public work, it is
142 clearly pointed out that the question now under discussion was not involved, and a grave doubt was expressed whether the provision of the Statute prohibiting alien labor on the public works of the state could be upheld, if attacked. The Court said; "It is not necessary to inquire how far, if at all, the right of citizens of other States seeking employment here, or those of aliens who have come here to improve their condition and to earn an honest living are ignored or restricted by this Statute. These questions have not been raised or argued, and we will only remark that it reverses the settled policy of this State from the earliest time. The policy of New York has always been to welcome not only the citizens of our sister states, but emigrants from abroad to equal participation in all the opportunities and advantages of its business life. If the policy indicated in the statute now under consideration had been formulated and carried into operation half a century earlier, it may be that the growth and progress of the State would not be the subject of so much pride or as gratifying to all the people as it is now."

Our conclusion upon this branch of the subject is that no support for the Act now under examination can be found in the cases which have upheld the laws restricting the hours of labor on public work, and fixing a minimum rate of pay. All of those cases rest upon considerations which are inapplicable to the present question.

It is sought to sustain the Act as an exercise by the State of the police power, that well recognized but not easily defined power under which the State may and often does restrict the liberty of the individual for the safety and protection of the community. It
143 is not easy, nor is it necessary to attempt to precisely define the scope and limitations of the police power, but it may be said generally to authorize such enactments as are deemed necessary for the protection of society and to guard its morals, safety, health and good order, but it is well recognized that in order to justify an act as an exercise of the police power there must appear to be some obvious and real connection between the terms of the enactment and some of the purposes for the attainment of which the police power may be exercised. Consequently an Act which invades personal rights or private property cannot be justified under the police power unless there be some discernible relation between it and some legitimate object of police regulation. Whether or not any statute can be upheld as a valid exercise of the police power is also a proper subject for judicial inquiry. It was said in Colon vs. Lisk (153

N. Y., 188): "The Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual or unnecessary restrictions upon lawful occupations. In other words its determination as to what is a proper exercise of its police power is not final or conclusive, but is subject to the supervision of the Courts (Lawton vs. Steele, 152 U. S., 133, 137). Whenever the Legislature passes an act which transcends the limits of the police power, it is the duty of the judiciary to pronounce it invalid, and to nullify the legislative attempt to invade the citizens' rights. (People ex rel. Nechamus vs. Warden, 144 N. Y., 529, 535.) That power must be exercised subject to the provisions of both Federal and State Constitutions. Laws passed in the exercise of it must tend towards the preservation of the lives,
144 health, morals or welfare of the community, and the Court must be enabled to see some clear and real connection between the assumed purpose of the law and the actual provisions thereof, and that the latter tend in some plain and appreciable manner towards the accomplishment of the objects for which the legislature may use this power (Health Department vs. Rector, 145 N. Y., 32, 39)." It seems to be quite clear that the provision of the labor law now under consideration cannot be upheld on this ground. As was said by Chief Judge Cullen in discussing a so-called "eight-hour law:" "It seems to me to be entirely clear that the Statute cannot be upheld as an exercise of the police power vested in the legislature. I should think the proposition too clear for debate, but, if this assertion be considered dogmatic, then I say that the question is settled by the decisions both of this Court and the Supreme Court of the United States. While the field for the exercise of the police power, subject to which all property is possessed by the citizen and all his callings or vocations must be pursued, is very broad, so broad that no Court has sought to define accurately its extent, still it is subject to recognized limitations." (People vs. The Orange County Road Construction Company, 175 N. Y., 84-87).

In a later case the Court of Appeals, while sustaining the validity of an eight hour law, said: "We do not uphold the Labor Law as constitutional to the limited extent that we pass upon it at all, because it is authorized by the police power which belongs to the State, for we cannot see that it bears any reasonable relation to the public health, safety or morals" (People ex rel. Williams, etc., vs. Metz, 193 N. Y., 148-159). We too are unable to see how the pub-
145 lic health, safety or morals can be affected by the citizenship or alienage of laborers upon the subways, or upon other work of a similar character. It is true that in certain cases, and with reference to certain occupations it has been held to be lawful, under the police power, to discriminate between citizens and aliens, but the very cases in which it has been so held, and the reasons given for so holding illustrate their inapplicability to the present case. Thus in Commonwealth vs. Hana (195 Mass., 262), an Act was upheld that prohibited the issuance of peddlers' licenses to any person except citizens or those who had declared their intention to become citizens. A similar act had been held unconstitu-

tional in Maine (State vs. Montgomery, 94 Maine, 192). The Supreme Court of Massachusetts, however, sustained the act in that State on the ground that the Legislature might have discovered a reason for passing the act because: "the business of peddling furnishes such opportunities for the practice of fraud that it is a proper subject for legislative regulation, and that such regulation has been practiced from early times both in Europe and America is shown at length by Mr. Justice Gray in Ernest vs. Missouri, 156 U. S., 296." In the course of its opinion the court quoted the Fourteenth Amendment and said: "It is decided that this provision applies to aliens as well as to citizens of the United States, and it is clear that a statute arbitrarily forbidding aliens to engage in ordinary kinds of business to earn their living would be unconstitutional and void."

So also statutes have frequently been upheld which discriminated in favor of citizens as against aliens in the matter of granting licenses to trade in liquor, but the relation of the liquor traffic to the
146 health, morals and good order of the community is obvious and has been recognized from the earliest times, and this relation has been the reason given for the discrimination. It is quite true that classification is not necessarily unlawful discrimination, and that the State has broad powers of classification for the purposes of legislation, but to be lawful such classification must have some reasonable basis to rest upon and must not be arbitrary or capricious or founded on mere whim (Peo. ex rel. Farrington vs. Mensching, 187 N. Y., 8-16; Gulf, Colorado & Santa Fe R'way vs. Ellis, 165 U. S., 150).

It would certainly be anomalous and illogical to uphold on this ground a statute or classification based upon the precise discrimination which is forbidden by the Fourteenth Amendment, and having no other discernible basis.

It is also sought to sustain the Act by drawing a supposed analogy between it and the numerous enactments, constitutional and legislative, which require that public officers shall be citizens. It is plain that there is no such analogy. Public officers are a part of the political structure of the State and there is a clear distinction between them and laborers, and an even more clear distinction between them and the laborers employed by an individual contractor, even when engaged upon public work.

It is also argued that the State has the right to determine with whom it will contract or permit its constituent sub-divisions to contract, and has also the right to prescribe terms which such contracts shall contain. This is true however nly if the terms prescribed are not such as violate the fundamental and paramount law to which even the State is subject.

It is also argued that since each of the contractors has
147 signed the contracts containing the restrictive clause they cannot be heard to object to its enforcement. The contractors however are not the only persons to be affected. The alien laborers, for whose protection among others the Fourteenth Amendment was adopted, and who have come to this country relying upon its promises of equal opportunity, are vitally interested that its protection

shall not be denied them. But even if we consider the contractors alone the argument fails. It appears upon the face of the contracts themselves that the restrictive clause was imported into them solely in obedience to the requirements of the Labor Law. The rule in such cases is that the restrictive clause and the penalty provided for its violation both become inoperative if the Statute prescribing them is held to be invalid (Home Ins. Co. vs. Morse, 87 U. S., 445-458; Peo. ex rel. Rodgers vs. Coler, 166 N. Y., 1).

We have heard and considered various arguments dealing with the sociological aspects of the case, and others dealing with somewhat far fetched suppositions as to the dire results that might be expected from the employment of aliens in constructing the subways in case this Country should ever, unhappily, be engaged in war with some foreign Country. Such arguments, in our opinion, afford no assistance in the solution of what is purely a legal question.

Our conclusion therefore is that the provisions of Section 14 of the Labor Law quoted earlier in this opinion are violative of the Fourteenth Amendment of the Constitution of the United States and therefore void. Our attention has been called to the text of numerous treaties between the United States and foreign Countries which, as it is claimed, expressly forbid discriminating legis-
148 lation of this character. In view of the conclusion we have reached upon the Constitutional question it is unnecessary to discuss any question arising under these treaties.

An interesting question has been raised as to whether or not the clause quoted from the Labor Law applies to the work of building subways for the Rapid Transit system in the City of New York. It seems to be conceded by all of the respondents that it would be incompetent for the legislature to impose upon private persons or corporations not engaged in performing public work, such restrictions as are attempted to be imposed upon the City of New York as an arm of the State. This assumption opens up a wide field for inquiry upon which we do not propose to enter, and it is not necessary to do so because the Act by its own terms is made applicable only to the construction of public works. The contention is that the construction of the subways is a private work undertaken by the City of New York in its proprietary character, and not a public work undertaken by the City as the alter ego of the State in its Sovereign capacity. It is quite true that generally speaking municipalities are considered as merely the creatures of the State, and its auxiliaries for the purpose of local government. This view was elaborated in Atkin vs. Kansas, supra. The City of New York however is different from many cities in this, that it possesses under its ancient charters and patents much private property which it holds not as a part of the sovereign, but as a proprietor, and there is a clear distinction between work undertaken by the City as the delegate of the State, and that undertaken by it in its private or corporate capacity, which it may undertake or
149 not as it sees fit, and to undertake which it cannot be coerced by the Legislature. In the one case the City acts as a political subdivision of the State; in the other as a private and independent contractor. The building of the subway appears to fall within the

latter class. The City's relation thereto has recently been stated by the Court of Appeals as follows: "Was the action of the City in building the subway governmental or proprietary in character? The City owns the subway, and it is a railroad corporation so far as the construction, operation and leasing thereof is concerned. It was not required, but simply permitted to build and operate the road * * * in other words, the subway is a business enterprise of the City, through which money may be made or lost, the same as if it were owned by an ordinary railroad corporation. It is built by and belongs to the City as a proprietor and not as a sovereign" (Matter Rapid Transit Commissioners, 197 N. Y., at p. 96). In view of this language there is much ground for saying that, even if the State could lawfully impose the test of citizenship upon employees of its own contractors, and the contractors with the City engaged in what is properly State work, it has no more power to impose such a test upon persons employed in building a subway for the City, than it would have if the subways were being constructed by a private corporation or individual.

We do not consider it necessary to expand this opinion by a prolonged discussion of this interesting question, since the conclusion at which we have arrived upon the other branch of the case necessitates a reversal of the judgments appealed from. The judgment of conviction against the defendant Crane will therefore be reversed and the defendant discharged.

150 The judgment sustaining the demurrer to the complaint of the appellant Heim will be reversed and the demurrer overruled with costs to said appellant in the Court and the Court below, and judgment directed for the relief demanded in the Complaint.

All Concur.

Opinion of Presiding Justice Ingraham, Concurred in by Mr. Justice McLaughlin.

Supreme Court, Appellate Division, First Department, December, 1914.

George L. Ingraham, P. J.,
Chester B. McLaughlin,
Francis M. Scott,
Victor J. Dowling,
Henry D. Hotchkiss, JJ.

No. 6655.

WILLIAM HEIM, Plaintiff-Appellant,
vs.
EDWARD E. MCCALL et al., etc., Defendants-Respondents; CRANFORD Co. et al., Defendants-Appellants.

INGRAHAM, *P. J.*:

I fully concur in the opinion of my Brother Scott that Section 14 of the Labor Law is a violation of both the Federal and State constitutions.

151 As to the second question raised, I do not think that this section of the Labor Law applies to contracts made by the

City of New York to build the subways which are described in the complaint in this action. The question, it seems to me, is not whether the legislature had power to regulate the method by which the municipal corporation of the City of New York should carry on its work or make its contracts for the improvement of the property which it held as a proprietor or owner of such property, but whether the legislature has attempted to do so. The provision of Section 14 of the Labor Law is: "In the construction of public works, by the State or a municipality or persons contracting with the State or such municipality, only citizens of the United States shall be employed." This provision relates solely to the construction of public works, and in the construction of such public works the evident intention was to limit the power of the State or a municipality or any persons contracting with the State or municipality. It was conceded that the City of New York has large interests which it holds, not as public property in the sense which such property is held by the State or a municipal corporation for public purposes, but in a strictly proprietary right, and which it is authorized by the legislature to improve for the benefit of the City and to enable it to receive for the City the profits which will accrue from such improvements. Take the case of the docks and wharves that the City owns and has improved and rents to those engaged in the commerce of the port, receiving for the use of the municipal corporation the rents or emoluments paid for their use. As to a contract to build such a dock or structure thereon,

I think it could well be said that it was not a public work in
152 which the City was engaged, but rather a private work for the benefit of the municipality, as distinct from a work for the benefit of the public at large. So as to many other contracts which the City is authorized to make for the improvement of its property and for the enhancement of its revenue. And it seems to me clear that the building of these subways is within this class. The City is not building these subways for the benefit of the People of the State, but for the benefit of the municipal corporation, and it owns such subways, and they are operated not as public works but as the private property of the City. It is authorized to lease these subways when built to a private corporation. All the public are excluded from the subways or the benefits that flow from their construction and operation except upon the payment of a fee charged, a percentage of which is paid to the City, and at the expiration of the term for which they are leased the property reverts absolutely to the City to be a part of its private property. Matter of Board of Rapid Transit Commissioners, 197 N. Y., 96.

It seems clear, therefore, that even assuming that the legislature had power to impose such an obligation upon the City of New York by limiting the prohibition to "public works," such limitation did not apply to work of the character described in the complaint in this action, and therefore the provision of this section of the Labor Law did not appply to the City of New York when building a subway or railroad as a business enterprise of the City.

Concur.

McLAUGHLIN, *J.*

153 *Notice of Appeal to Court of Appeals.*

Supreme Court, New York County.

WILLIAM E. HEIM, Plaintiff-Respondent,
vs.
EDWARD E. McCALL, MILO R. MALTBIE, J. SERGEANT CRAM, GEORGE V. S. Williams, and Robert C. Wood, as Members of and Constituting the Public Service Commission for the First District of the State of New York, Defendants-Appellants; Cranford Company and Flinn-O'Rourke Company, Inc., Defendants-Respondents.

Notice of Appeal.

SIRS: Please take notice that the defendants, Edward E. McCall, Milo R. Maltbie, J. Sergeant Cram, George V. S. Williams and Robert C. Wood, as members of and constituting the Public Service Commission for the First District of the State of New York, hereby appeal to the Court of Appeals of the State of New York from the order of the Appellate Division, First Department, entered herein in the office of the Clerk of the County of New York on the 5th day of January, 1915, reversing the order and judgment of the Su-
154 preme Court entered on the 12th day of December, 1914 in the office of the Clerk of the County of New York and overruling the demurrer to the amended complaint herein and granting the relief demanded in the said complaint, and from the judgment herein filed and entered upon the aforesaid order of the Appellate Division in the office of the Clerk of the County of New York on the 6th day of January, 1915, and from each and every part of said order and judgment.

Dated, January 8, 1915.

GEORGE S. COLEMAN,
Counsel to the Public Service Commission for the First District, Attorney for Defendants-Appellants, 154 Nassau Street, Borough of Manhattan, New York City.

To William F. Schneider, County Clerk, County of New York.
Thomas F. Conway, Attorney for Plaintiff-Respondent.
Grout & Grout, Attorneys for Defendants-Respondents.

155 *Stipulation Waiving Certification.*

It is hereby stipulated that the foregoing are true and correct copies of the notice of appeal to the Court of Appeals, the order of reversal, the judgment of reversal, the judgment roll, and all the papers before the Appellate Division of the Supreme Court, First Department, upon which the appeal was heard, and of the whole thereof

and certification thereof pursuant to Sections 1315 and 3301 of the Code of Civil Procedure, or otherwise, is hereby waived.

Dated, January 14, 1915.

GEORGE S. COLEMAN,
Counsel to the Public Service Commission for the First District, Attorney for Defendants-Appellants.

THOMAS F. CONWAY,
Attorney for Plaintiff-Respondent.
EDWARD M. GROUT AND
PAUL GROUT,
Attorneys for Defendants-Respondents.

156 Form 6.

Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the Court of Appeals, Held at the Capitol, in the City of Albany, on the 25th Day of February, in the Year of Our Lord One Thousand Nine Hundred and Fifteen, Before the Judges of said Court.

Witness, The Hon. Willard Bartlett, Chief Judge, presiding.
R. M. BARBER, *Clerk.*

Remittitur Febr'y 26th, 1915.

157 WILLIAM E. HEIM, Respondent,
ag'st
EDWARD E. MCCALL and O'rs, &c., Appellants; CRANFORD COMPANY and Ano., Respondents.

Be it Remembered, That on the 16th day of January in the year of our Lord one thousand nine hundred and fifteen Edward E. McCall and o'rs, &c. the appellants in this action, came here into the Court of Appeals, by George S. Coleman their attorney, and filed in the said Court a Notice of Appeal and return thereto from the order and judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. And William E. Heim and o'rs the respondents in said action, afterwards appeared in said Court of Appeals by Thomas F. Conway and Grout & Grout, their attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

158 Whereupon, The said Court of Appeals having heard this cause argued by Mr. George S. Coleman of counsel for the appellants, and by Mr. Thomas F. Conway and Mr. Edward M. Grout, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the judgment of the Ap-

pellate Division of the Supreme Court appealed from herein be and the same hereby is reversed and that of Special Term affirmed, with costs in all courts.

And it was also further ordered that the record aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

159 Therefore, It is considered that the said judgment of Appellate Division be reversed and that of Special Term affirmed, with costs in all courts, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by them given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, etc.

R. M. BARBER,
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, Feb'y 26th, 1915.

I Hereby Certify that the preceding record contains a correct transcript of the proceedings in said action in the Court of Appeals, with the papers originally filed therein, attached thereto.

[Seal Court of Appeals, State of New York.]

R. M. BARBER, *Clerk.*

160 STATE OF NEW YORK,
Court of Appeals,
State Reporter's Office, ss:

I, J. Newton Fiero, Reporter of the Court of Appeals of the State of New York, do hereby certify that I have compared the annexed copy of opinions in the case of People of the State of New York v. Clarence A. Crane, decided by the Court of Appeals on the 25th day of February, 1915, with the official opinions rendered in such case, and I further certify that the same is a true and correct copy of said opinions and of each and every part thereof.

In witness whereof, I have hereunto affixed my signature as Reporter of the Court of Appeals, at the City of Albany, in the State of New York, this 5th day of March, 1915.

J. NEWTON FIERO,
As Reporter of the Court of Appeals of the State of New York.

Attest:

[Seal Court of Appeals, State of New York.]

[L. S.] R. M. BARBER,
Clerk of the Court of Appeals.

STATE OF NEW YORK,
Court of Appeals:

I, Willard Bartlett, Chief Judge of the Court of Appeals of the State of New York, the highest Appellate Court and Court of Record in and for said State, do hereby certify that R. M. Barber is the clerk of said court, having custody of the seal of said court and of the decisions, minutes and records thereof, and that J. Newton Fiero is the official reporter of said court, having custody of the official opinions, written and handed down by said court and the members thereof, and of the official publication and reports thereof; and, I further certify that the attestation and authentication, by said clerk and said reporter of the annexed copy of the official opinions rendered in the case of People of the State of New York v. Clarence A. Crane, decided by the said Court of Appeals on the 25th day of February, 1915, is in due form and sufficient under the laws of the State of New York and the rules and practice of the said Court of Appeals; that the seal imprinted thereon is the true and genuine seal of the said Court of Appeals, and that the signature of R. M. Barber, as clerk of said court, appended thereto, is the true and genuine signature of said R. M. Barber, and the signature of J. Newton Fiero, as reporter of said court, appended thereto is the true and genuine signature of said J. Newton Fiero.

In witness whereof, I have hereunto subscribed my official signature, at the Chambers of said court, at the Capitol of said State, in the City of Albany and State of New York, on the fifth day of March, in the year of one thousand, nine hundred and fifteen.

WILLARD BARTLETT,
As Chief Judge of the Court of Appeals of the State of New York.

161 THE PEOPLE OF THE STATE OF NEW YORK, Appellant,
v.
CLARENCE A. CRANE, Respondent.

(Decided February 25, 1915.)

Appeal, by permission, from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered December 31, 1914, which reversed, solely for errors of law, a judgment of the Court of Special Sessions of the City of New York, convicting the defendant of a misdemeanor for violation of section 14 of the Labor Law of the State.

The facts, so far as material, are stated in the opinion.

Charles Albert Perkins, District Attorney (Robert S. Johnstone of counsel), for appellant.
Edward M. Grout for respondent.
Jeremiah A. O'Leary as amicus curiæ.

CARDOZO, *J.:*

The defendant is a contractor with the city of New York. His contract was for the construction of sewer basins. In doing the

work, he employed laborers not citizens of the United States. One of them was an Italian. The nationality of the others is not shown. Because of the employment of these aliens, he has been convicted of violating section 14 of the Labor Law (L. 1909, ch. 36, Cons. Laws, ch. 31). The section reads as follows:

"SECTION 14. Preference in employment of persons upon public works. In the construction of public works by the state or a municipality, or by persons contracting with the state or such municipality, only citizens of the United States shall be employed; and in all cases where laborers are employed on any such public works, preference shall be given citizens of the state of New York. In each contract for the construction of public works a provision shall be inserted, to the effect that, if the provisions of this section are not complied with, the contract shall be void. All boards, officers, agents or employees of cities of the first class of the state, having the power to enter into contracts which provide for the expenditure of public money on public works, shall file in the office of the commissioner of labor the names and addresses of all contractors holding contracts with said cities of the state. Upon the letting of new contracts the names and addresses of such new contractors shall likewise be filed. Upon the demand of the commissioner of labor a contractor shall furnish a list of the names and addresses of all subcontractors in his employ. Each contractor performing work for any city of the first class shall keep a list of his employees, in which it shall be set forth whether they are naturalized or native born citizens of the United States, together with, in case of naturalization, the
162 date of naturalization and the name of the court where such naturalization was granted. Such lists and records shall be open to the inspection of the commissioner of labor. A violation of this section shall constitute a misdemeanor and shall be punishable by a fine of not less than fifty dollars nor more than five hundred dollars, or by imprisonment for not less than thirty nor more than ninety days, or by both such fine and imprisonment."

The Appellate Division has held that this statute violates both the State and Federal Constitution. Its effect, we are told, is to deprive the excluded aliens of their liberty without due process of law, in that they are denied the right to labor on the public works. (Federal Const. 14th Amendment; State Const. art. 1, sec. 6.) The effect also is, we are told, to deny to the excluded aliens the equal protection of the laws. (Federal Const. 14th Amendment.) It is true the defendant is not within the excluded classes. (Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 545.) He is charged, however, with a crime, and the crime is said to have been the refusal to discriminate, and nothing else. The laborers whom he has employed are within the excluded classes; and if they had a right to serve, he on his side had a right to employ. To refuse to give effect to an unlawful discrimination, and to do this at the instance of those against whom the discrimination is aimed, cannot constitute a crime. The question whether this statute does discriminate against aliens in violation of the Constitution is, therefore, we think, before us.

The moneys of the state belong to the people of the state. They

do not belong to aliens. The state, through its legislature, has given notice to its agents, that in building its public works, it wishes its own moneys to be paid to its own citizens, and if not to them, then, at least, to citizens of the United States. The argument is made that in thus preferring its own citizens in the distribution of its own wealth, it denies to the alien within its borders the equal protection of the laws.

The people, viewed as an organized unit, constitute the state. (Penhallow v. Doane's Adm., 3 Dallas, 54, 100; Texas v. White, 7 Wall. 700, 720.) The members of the state are its citizens. (United States v. Cruikshank, 92 U. S. 542, 549; Minor v. Happersett, 21 Wall. 162.) Those who are not citizens, are not members of the state. Society thus organized, is conceived of as a body corporate. Like any other body corporate, it may enter into contracts, and hold and dispose of property. In doing this, it acts through agencies of government. These agencies, when contracting for the state, or expending the state's moneys, are trustees for the people of the state. (Illinois v. Illinois Central R. R. Co., 146 U. S. 387.) It is the people, i. e., the members of the state, who are contracting or expending their own moneys through agencies of their own
163 creation. Certain limitations on the powers of those agencies result from the nature of the trust. (Illinois v. Illinois Central R. R. Co., supra.) Since government, in expending public moneys, is expending the moneys of its citizens, it may not by arbitrary discriminations having no relations to the public welfare, foster the employment of one class of its citizens and discourage the employment of others. It is not fettered, of course, by any rule of absolute equality; the public welfare may at times be bound up with the welfare of a class; but public welfare, in a large sense, must, none the less, be the end in view. Every citizen has a like interest in the application of the public wealth to the common good, and the like right to demand that there be nothing of partiality, nothing of merely selfish favoritism, in the administration of the trust. But an alien has no such interest, and hence results a difference in the measure of his right. To disqualify citizens from employment on the public works is not only discrimination, but arbitrary discrimination. To disqualify aliens is discrimination indeed but not arbitrary discrimination, for the principle of exclusion is the restriction of the resources of the state to the advancement and profit of the members of the state. Ungenerous and unwise such discrimination may be. It is not for that reason unlawful.

The power of a state to discriminate between citizens and aliens in the distribution of its own resources is sanctioned alike by decisions of the courts and by long-continued practice. Neither aliens nor the citizens of other states are invested by the Constitution with any interest in the common property of the people of this state. (McCready v. Virginia, 94 U. S. 391, 394.) It has been held, therefore, that a state may deny to aliens, and even to citizens of another state, the right to plant oysters or to fish in public waters. (McCready v. Virginia, supra; People v. Lowndes, 130 N. Y. 455, 462; Commonwealth v. Hilton, 174 Mass. 29.) It may restrict to its

own citizens the enjoyment of its game. (Geer v. Connecticut, 161 U. S. 519, 529; Patsone v. Pennsylvania, 232 U. S. 138, 145.) It may discriminate between citizens and aliens in its charitable institutions, or in other measures for the relief of paupers. (Freund on the Police Power, sec. 712; State Charities Law [L. 1909, chap. 57], sec. 17.) It may make the same discrimination in the distribution of its public lands (McCready v. Virginia, supra); its mines (Justice Mining Co. v. Lee, 21 Colo. 260); its forests, or other natural resources. It may deny to aliens the right to hold or inherit real estate, except where the right has been secured by treaty. (Blythe v. Hinckley, 180 U. S. 333, 341.) The origin of this last disability is historical (1 Pollock & Maitland History of English Law, 445), but the policy underlying it is akin to the policy that underlies the others. The principle that justifies these dis-
164 criminations is that the common property of the state belongs to the people of the state, and hence that, in any distribution of that property, the citizen may be preferred.

To defeat this law it must, therefore, be held that the Constitution gives to the state a narrower liberty of choice in the expenditure of its own moneys than in the use or distribution of its other resources. I can find no justification for the supposed distinction. The construction of public works involves the expenditure of public moneys. To better the condition of its own citizens, and it may be to prevent pauperism among them, the legislature has declared that the moneys of the state shall go to the people of the state. The equal protection of the laws is due to aliens as to citizens (Yick Wo v. Hopkins, 118 U. S. 356, 369; Lem Moon Sing v. United States, 158 U. S. 538, 547); but equal protection does not mean that those who have no interest in the common property of the state, must share in that property on the same terms as those who have an interest.

In saying this, I assume that the purpose of the statute is not to promote efficiency in the doing of the work, but to discriminate in the distribution of the public wealth in favor of the citizen. There may be forms of employment where efficiency would be promoted by the employment of citizens, and if the statute were restricted to such employments, its validity would not be doubtful. Just as the state may confine to citizens the right to hold public office, so, on the same ground, it may confine to citizens the right to serve the state in any way, whenever there is a relation between the exclusion of aliens and the promotion of efficiency. There are many lines of service where it is conceivable that the employment of citizens will make for a stable administration. If the government were to take over the railroads, there would be force in the argument that the trains should be run by citizens on whose loyalty the government might depend in times of national disaster. We have grown accustomed to the government's administration of the mails, and none of us doubts that the service is one from which aliens may be excluded. In all these branches of employment, it is not difficult to discover some relation between citizenship and efficiency. The prohibition of alien labor in this statute is, however, unrestricted. It applies to the most temporary and occasional service, and to the

lowest grades of labor. Even in those cases, it is for the legislature, according to the People's claim, to determine whether some relation exists between efficiency and citizenship; between loyalty in service, and service by the loyal. Such tests of fitness have a fair relation to permanent positions where a spirit of allegiance to the employer may be cultivated. It seems far fetched, however, to apply them to the task of day laborers excavating for sewers
165 or digging trenches for a subway. The relation in such circumstances is so remote that we may consider it illusory. At least, I shall so assume for the purpose of this discussion. The statute has been frankly defended at our bar as a legitimate preference of citizens, not to promote the efficiency of the work, but to promote the welfare of the men preferred; and from that aspect, it will be frankest and safest for us to view it.

To concede that such a preference was intended, is not to condemn the statute as invalid. The state in determining what use shall be made of its own moneys, may legitimately consult the welfare of its own citizens rather than that of aliens. Whatever is a privilege rather than a right, may be made dependent upon citizenship. In its war against poverty, the state is not required to dedicate its own resources to citizens and aliens alike. "The relief of the poor, the care of those who are unable to care for themselves, is among the unquestioned objects of public duty." (Brewer, J., in State v. Osawkee T. P., 14 Kan. 424.) The modern state everywhere is mindful of that duty. It has extended its bounty in large measure, though not without some discrimination, to aliens; but it would not trench upon their rights under the Constitution if it were to confine its bounty to its citizens. As it may discriminate between citizens and aliens in relief, so also it may discriminate in employment. When payment for public works is to be made from public funds, it may prefer in employment its own citizens, since to them the legislature may believe that the first duty is owing. (United States v. Realty Co., 163 U. S. 427, 440.) Everywhere throughout the world the state, in its relation to the laborer, is assuming a larger obligation; but it cannot be that it owes this obligation to citizens and aliens in equal measure. In Great Britain there was enacted in 1905 a statute providing for old age pensions, restricted, it may be noted, to British subjects. (8 Edw. 7, chap. 40, sec. 1.) In the same kingdom there was enacted in 1911 a statute providing for insurance against unemployment. (1 & 2 George 5, chap. 55.) In our own country the workmen's compensation laws that have been adopted in many states are phases of the same world-wide movement. We are not concerned at this time with the validity of these measures for the alleviation of the laborer's lot. We mention them as illustrations of an expanding consciousness in the modern state that relief against unemployment, both after the event and before it, is part of the state's function. In one of our states the courts have sustained a law providing for state help to farmers. (North Dakota v. Nelson Co., 1 N. D. 88.) How far the state will go beyond its own citizens in thus applying its own resources for the betterment of conditions the legislature must say. Preferences to re-

lieve against pauperism after it has become an accomplished
166 fact do not violate the rights of aliens. Preferences to avert
a threatened pauperism, or to render pauperism impossible, stand on the same footing. In each instance the state announces as its public policy that the common property shall be used for the benefit of its common owners.

The argument is made, however, that there is a distinction between the right of government to exclude aliens from its own employment and the right to exclude aliens from employment by independent contractors. The ruling of the Supreme Court of the United States in Atkin v. Kansas (191 U. S. 207), and in Ellis v. United States (206 U. S. 246) goes far to invalidate the distinction. The first case considered a statute of Kansas prohibiting the employment of laborers for more than eight hours a day on any public work. The statute was held valid in its application to laborers in the service of contractors. The second case sustained a like statute, passed by Congress, to regulate employment on public works in the District of Columbia. The presence of an independent contractor, interposed between the state and the laborer, did not check the power of the government to prescribe the hours of labor. But without reference to those decisions, the distinction is inadequate. In a real and substantial sense, it is the money of the state that is paid to the laborers, though the distribution is made through the medium of contractors. That money constitutes the fund out of which the wages of laborers are payable. This is not only true as an economic and social fact. It is true also as a statement of the legal rights of those concerned. The state (Lien Law [L. 1909, ch. 38], sec. 5) has given to any laborer employed by a contractor in the construction of a public improvement, a lien for the value of his labor upon the moneys of the state applicable to that improvement. The state has thus defined the channels through which the payment must be made. It has assumed a direct obligation not only to its own employees, but also to the employees of contractors on its works. To say that the latter class of employees receive, not the state's moneys, but those of the contractors, is to put form above substance. The great problems of public law do not turn upon these nice distinctions. The fundamental powers of the state and the fundamental rights of man are built upon a broader basis. The truth and substance of the situation is that the contractor's employees are doing the state's work, and are paid out of the state's moneys; and this truth ought not to be obscured by distinctions between contractors and servants established to fix the gradations of civil liability.

I do not ignore what was said in People v. Orange County Road Construction Co. (175 N. Y. 84). There is a suggestion in that
case, but not a ruling, that a distinction exists between
167 employees of the state and those of a contractor in respect of
the state's power to regulate the hours of labor. The later case of Atkin v. Kansas (191 U. S. 207) has obliterated the distinction, and so it was conceded in People ex Rel. Cossey v. Grout (179 N. Y. 417). It is now perceived that all persons engaged on the public works, from the highest officers to the lowest laborers, through all the gradations of contractors and subcontractors, are,

in a very vital sense, in the service of the state. The state has a legitimate concern in the selection of the men to be employed from one extreme of the official hierarchy to the other. Whether they are called officers or employees does not matter. The power of the legislature depends upon the substance of things, and not upon names and labels.

To hold that this statute violates the Federal Constitution would be to ignore the contrary judgment expressed in the Constitutions and legislation of many other states. There is a like provision in the Constitution of Arizona (Art. 18, sec. 10), a Constitution which was approved (so far as this provision is concerned) by joint resolution of Congress (37 U. S. Stat. at Large, p. 39). There are like provisions in the Constitution of Idaho (Art. 13, sec. 5), and in that of Wyoming (Art. 19, § 1), which were also approved by Congress. There is a like provision, restricted, however, to Chinese, in the Constitution of California (Art. 19, sec. 3). There are like provisions applicable to all aliens in the statutes of Massachusetts (Acts of 1909, chap. 514, sec. 21), New Jersey (Compiled Statutes of New Jersey, 1910, p. 3023, sec. 15), Pennsylvania (Purdon's Digest [13th ed.], vol. 2, p. 2172, sec. 8), and California (California Code, 1906, Act No. 127, General Laws of California). Legislation similar in purpose may be found in Montana (Revised Code, sec. 2250), Nevada (Revised Laws of Nevada, 1912, sec. 3483), Oregon (Laws of Oregon, sec. 6267) and Hawaii (Acts of Congress, Revised Laws 1905). Unless the case against this statute is a clear one, the courts may not ignore this concurrence of opinion. (Lemieux v. Young, 211 U. S. 489, 493.)

In thus holding that the power exists to exclude aliens from employment on the public works, we do not, however, commit ourselves to the view that the power exists to make arbitrary distinctions between citizens. We do not hold that the government may create a privileged caste among the members of the state. (Smith v. Texas, 233 U. S. 630, 638.) We do not hold that it may discriminate among its citizens on the ground of faith or color. (Strauder v. West Virginia, 100 U. S. 303; Gibson v. Mississippi, 162 U. S. 565; Rogers v. Alabama, 192 U. S. 226, 231.) A citizen may not be disqualified because of faith or color from service as a juror. (Strauder v. West Virginia, supra.) For like reasons we
168 assume that he may not be disqualified because of faith or color from serving the state in public office or employment. It is true that the individual, though a citizen, has no legal right in any particular instance to be selected as contractor by the government. It does not follow, however, that he may be declared disqualified from service, unless the proscription bears some relation to the advancement of the public welfare. (Strauder v. West Virginia, supra, at page 305.) The legislature has unquestionably the widest latitude of judgment in determining whether such a relation exists, but we are not required to hold that there is no remedy against sheer oppression. Where the line must be drawn, we do not now determine. We do not say that the legislature could single out A and B by name, and declare that, though citizens, they should never be employed on any public work. It may well be

that such disqualification would be illegal under the Fourteenth Amendment of the Federal Constitution, in that it would deny to the citizens thus arbitrarily excluded the equal protection of the laws, and illegal also under our State Constitution, which provides (Art. 1, sec. 1): "No member of this State shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers." This opinion has failed of its purpose if it has failed to demonstrate that those provisions are without application to the exclusion of aliens from the enjoyment of the state's resources.

It must also be evident that nothing in this opinion gives countenance to the view that the government may deny to aliens the right to engage in any private trade or calling on terms of equality with citizens. (Yick Wo v. Hopkins, 118 U. S. 356, 369; Matter of Parrott, 1 Fed. Rep. 481.) If the calling is one that the state, in the exercise of its police power, may prohibit either absolutely, or conditionally by the exaction of a license, the fact of alienage may justify a denial of the privilege. (Patsone v. Pennsylvania, 232 U. S. 138; Comm. v. Patsone, 231 Penn. St. 46; Comm. v. Hana, 195 Mass. 262; Bloomfield v. State, 86 Ohio St. 253; State v. Travelers Ins. Co., 70 Conn. 590, 600.) There must, however, be some relation in such case between the exclusion of the alien and the protection of the public welfare. But subject only to the exercise of the police power, it is true that in dealings between man and man, the alien and the citizen trade and labor on equal terms. It is a denial of the equal protection of the laws when the government, in its capacity as a lawmaker, regulating, not its own property, but private business, bars the alien from the right to trade and labor. It is not a denial of the equal protection of the laws when the government, in its capacity as proprietor, issuing a mandate to its own agents (United States v. Martin, 94 U. S. 400; Carter, Law, its Origin, Growth and Functions, p. 230), bars the alien from
169 the right to share in the property which it holds for its own citizens.

Because the state may thus discriminate in favor of the citizen in regulating employment on its public works, it does not follow, however, that it may exclude aliens from the enjoyment of those works after they have been completed. Aliens may use the public highways as freely as citizens. Aliens may use the railroads and other agencies of transportation as freely as citizens. The reason is that the right to move about from place to place within the state is incidental to the right to live within the state. There are probably many other public works so intimately related, if not to life, at least to health and comfort, that merely arbitrary or oppressive discrimination against the alien in regulating their use, would be a denial by the state of the equal protection of the laws. To attempt to draw the line in advance is futile. The question must in each case be whether the use is one that is reasonably incidental to life under modern conditions in a civilized state, or whether it is rather a privilege which the state may grant or may withhold. To be employed by the state on the public works, and to receive pay-

ment out of the public purse is, I think, a privilege rather than a right. (Atkin v. Kansas, supra, at p. 223.)

The argument is made that if the statute is not invalid as in conflict with the Fourteenth Amendment of the Constitution, it is invalid as in conflict with treaties between the United States and foreign nations. Typical of these treaties is the one with Italy. It provides: "The citizens of each of the high contracting parties shall have liberty to travel in the States and Territories of the other, to carry on trade, wholesale and retail, to hire and occupy houses and warehouses, to employ agents of their choice, and generally to do anything incident to, or necessary for trade, upon the same terms as the natives of the country, submitting themselves to the laws there established. The citizens of each of the high contracting parties shall receive, in the States and Territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are, or shall be, granted to the natives, on their submitting themselves to the conditions imposed upon the natives." This treaty, in my judgment, does not limit the power of the state, as a proprietor, to control the construction of its own works and the distribution of its own moneys.

The argument is also made that discrimination between citizens and aliens may increase the cost of public works by limiting the supply of labor; and that to do this, in order to better the condition of our laborers, is to violate restrictions of the Constitution of the state. Article VIII, section 9, of the State Constitution pro-
170 vides that "neither the credit nor the money of the State shall be given or loaned to or in aid of any association, corporation or private undertaking." Article VIII, section 10, provides, "No county, city, town or village shall hereafter give any money or property, or loan its money or credit to or in aid of any individual, association or corporation, or become directly or indirectly the owner of stock in, or bonds of, any association or corporation; nor shall any such county, city, town or village be allowed to incur any indebtedness except for county, city, town or village purposes. This section shall not prevent such county, city, town or village from making such provision for the aid or support of its poor as may be authorized by law." The money that goes to laborers on public works is not given or loaned in aid of individuals within the meaning of these provisions. It is paid for service rendered. That is the direct and primary purpose of the payment. The primary and direct purpose being legal, the payment does not become illegal because a collateral and secondary purpose may be to protect a large class of the community against the peril of pauperism. In the long run, the payment may be found to have lessened the public burdens rather than to have increased them. (Noble State Bank v. Haskell, 219 U. S. 104, 110, 111.) The same argument was made against the validity of the statute for an eight-hour day. It was said that the result would be to increase the cost for the benefit of favored classes. The legislature is now empowered by the Constitution to fix the wages and salaries of all employees upon the public works. This authority embraces the direct increase of ex-

pense by increasing salaries beyond the minimum fixed by competition. It must also embrace the indirect increase of expense by regulations of employment tending to diminish competition.

I have not overlooked, though I have not attempted to analyze, the decisions of this court in which the statutes governing the hours of labor on public works were the subject of discussion. (People ex rel. Rodgers v. Coler, 166 N. Y. 1; People v. Orange County Road Construction Co., 175 N. Y. 84; Ryan v. City of New York, 177 N. Y. 271; People ex rel. Cossey v. Grout, 179 N. Y. 417.) The specific proposition there decided has ceased to be law in this state. So far as it was founded on the theory of a conflict between the statute and the Federal Constitution it was overruled by the United States Supreme Court in Atkin v. Kansas (191 U. S. 207). So for as it was founded on the theory of a conflict between the statute and the Constitution of this state it was superseded by the amendment of the Constitution in 1905. (Const. art. 12, sec. 9; People ex rel. Williams E. & C. Co. v. Metz, 193 N. Y. 148.) The earlier cases are no longer authorities, therefore, for any proposition
171 actually decided. Their reasoning may still instruct, but no longer control us. They were decided in nearly every instance by a bare majority. In at least one instance a majority did not unite in anything more than the result. It would serve no useful purpose to review the varying opinions at this time. It is enough to say that they are not decisive of the case at hand.

This statute must be obeyed unless it is in conflict with some command of the Constitution, either of the state or of the nation. It is not enough that it may seem to us to be impolitic or even oppressive. It is not enough that in its making, great and historic traditions of generosity have been ignored. We do not assume to pass judgment upon the wisdom of the legislature. Our duty is done when we ascertain that it has kept within its power. (Bertholf v. O'Reilly, 74 N. Y. 509, 515; People v. Gillson, 109 N. Y. 389, 398; Atkin v. Kansas supra.) "It must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." (Holmes, J., in Missouri, Kansas & Texas Ry. Co. v. May, 194 U. S. 267, 270.) If doubt exists whether there is a conflict between the statute and the Constitution, the statute must prevail. (Barrett v. Indiana, 229 U. S. 26, 31; People v. Gillson, supra.) These guiding principles are not to be honored by lip service only. Mischief and hardship, it is said, will follow the enforcement of this law. If that is so, we cannot help it. To correct those evils, if they shall develop, will be the province of legislation. The statute does not withhold from the alien the rights secured to him by the Constitution; and we must enforce it as the law.

The judgment of the Appellate Division should be reversed, and the judgment of conviction affirmed.

WILLARD BARTLETT, *Ch. J.* (concurring):

Whatever may be my own views as to the wisdom or fairness of the statute before us, I am entirely clear that it is constitutional and that the question is settled by the decision both of the United States Supreme Court and of this court.

These decisions establish the proposition that the state in the prosecution of a public work stands in just the same position as an individual; that it may prescribe the conditions on which it will contract for such work; and that it may make the violation of his contract on the part of the contractor a criminal offense. It is so held in Atkin v. Kansas (191 U. S. 207, 223) where the Supreme Court of the United States said that "no employee is entitled, of absolute right and as a part of his liberty, to perform labor for the state; and no contractor for public work can excuse a violation of his agreement with the state by doing that which the statute under which he
172 proceeds distinctly and lawfully forbids him to do." This language was quoted with approval by this court in People ex rel. Williams Eng. & Contr. Co. v. Metz (193 N. Y. 148) and the doctrine therein declared thus received the sanction of all the judges who sat in that case.

In Ellis v. United States (206 U. S. 246, 256), which involved the validity of a Federal labor law, it was held that "the government purely as a contractor, in the absence of special laws, may stand like a private person, but by making a contract it does not give up its power to make a law;" and in the exercise of this power it may declare a violation of his contract by the contractor to be a crime. In answer to a suggestion that the purpose of the statute was to secure to labor certain advantages in conditions over which Congress has not general control, Mr. Justice Holmes said that the existence of such a motive would not render a law unconstitutional which was otherwise valid and that the power which Congress has over the mode in which contracts with the United States shall be performed could not be limited by a speculation as to motives.

However subsequent legislation or adjudications may have modified the effect of the decision in People v. Orange County Road Construction Co. (175 N. Y. 84, 90) it still remains true, as was said by Judge Cullen in that case, that "if the state itself prosecutes a work it may dictate every detail of the service required in its performance; prescribe the wages of workmen, their hours of labor, and the particular individuals who may be employed. * * * The state in this respect stands the same as its citizens."

How great the rights of private citizens are in their status as employers is aptly illustrated by Jacobs v. Cohen (183 N. Y. 207) where this court held that the contract between an employer and a labor union whereby the employer agreed for a certain period to employ only members of the union was not violative of public policy or otherwise forbidden by law. In the opinion we reiterated the assertion made in National Protective Association, etc., v. Cumming (170 N. Y. 315, 341) that every man has a right "to carry on his business in any lawful way that he sees fit. He may employ such men as he pleases and is not obliged to employ those who, for any reason, he does not wish have work for him."

It seems to me that the only constitutional prohibition which can be relied upon with any confidence to invalidate the statute forbidding the employment of aliens upon the public works of this state, is the provision of the Fourteenth Amendment to the Federal Con-

stitution which declares that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

If it is a denial of the equal protection of the laws for an
173 employer of labor to refuse to afford a designated class of persons an opportunity to work for him, it must be conceded that this statute was enacted in disregard of the constitutional provision thus invoked.

I can find no reason to suppose, however, that the Fourteenth Amendment was designed to limit or restrict the rights of a state as an employer of labor. Other employers, individual or corporate, possess the undoubted and absolute right to withhold employment from whomever they see fit. The Constitution could hardly have been intended to deprive the states of equality with private employers in this respect; yet if the Fourteenth Amendment invalidates the statute in question, the great railroad corporation which is erecting its new station in Albany to-day may refuse to allow aliens to work upon it, while the state of New York, in repairing the capitol, must give aliens an equal opportunity with citizens to aid in its reconstruction.

The statute is nothing more, in effect, than a resolve by an employer as to the character of his employees. An individual employer would communicate the resolve to his subordinates by written instructions or by word of mouth. The state, an incorporeal master, speaking through the legislature, communicates the resolve to its agents by enacting a statute. Either the private employer or the state can revoke the resolve at will. Entire liberty of action in these respects is essential unless the state is to be deprived of a right which has heretofore been deemed a constituent element of the relationship of master and servant, namely, the right of the master to say who his servants shall (and therefore shall not) be.

If the alien labor law under consideration is violative of the Fourteenth Amendment, the preference given to veterans by the Constitution of the state of New York must likewise be invalid. (Const. of New York, art. V. sec. 9.) Appointments and promotions in the civil service of the state and of all civil divisions thereof, including cities and villages, are thereby required to be made according to merit and fitness to be ascertained as far as practicable by examinations, which so far as practicable shall be competitive; "provided, however, that honorably discharged soldiers and sailors from the army and navy of the United States in the late civil war, who are citizens and residents of this state, shall be entitled to preference in appointment and promotion, without regard to their standing on any list from which such appointment or promotion may be made." Here is a preference in the public service based wholly upon a status acquired half a century ago, and a preference of one class of citizens over all others. There could not be a clearer case of discrimination. I think that the Federal Constitution permits such discrimination; but I should not think so if it be held that the statute in question here is in conflict with the Fourteenth Amendment.

174 The differences of opinion upon the present appeal are necessarily radical and depend upon the question whether the

denial of an opportunity to work for the state is a denial of the equal protection of the laws. For the reasons which I have briefly stated, in addition to those set forth so clearly and cogently in the opinion of my brother Cardozo, I think this question must be answered in the negative. I do not believe that either the Fourteenth Amendment or any other of the constitutional provisions relied upon by the respondent was designed to limit the right of the state to choose its own servants.

SEABURY, *J.* (concurring):

This case in no way involves the right of private citizens to employ aliens in private work. It presents only the question of the right of the state to exclude aliens from employment upon its public works. The distinction is vital and must be kept in mind throughout the discussion of this case.

I concur in the opinion that the statute is constitutional. I agree that, because of the public character of the work to which the statute relates, the discrimination against aliens is not an arbitrary discrimination. I agree also that the law cannot be upheld upon the ground that it is designed to promote efficiency upon the public works of the state. The present case, as I view it, does not involve merely the right of the state to prescribe the manner in which its public money may be distributed. The money expended for public works would necessarily be expended whether citizens or aliens were engaged in constructing them. The money paid by the state for this purpose is not a gratuity, but is paid as compensation for services rendered and the rendering of these services creates a public value at least equal to the money expended. The distribution of public money for this purpose is only an incident of the state's exercise of its right as proprietor and owner of its public works. This case involves the right of the state as owner or proprietor to exclude aliens from working upon its public works and to accord to its own citizens a preference in being employed upon such public works, over other citizens of the United States. No citizen, as an incident of citizenship, has any right to be employed upon public works. If to be employed upon public works is in any sense a right or privilege under the State Constitution (Art. 1, sec. 1), it is equally so under the provisions of the Fourteenth Amendment to the Federal Constitution. Thus if the right to be employed on public works is a right or privilege incident to citizenship the state might discriminate against aliens, but it could not, under the provisions of the Federal Constitution, discriminate in favor of its own citizens against citizens of another state. Yet the state may discriminate as between its own citizens and citizens of a sister state, and even in favor of some of its citizens and against others as to the use that shall be made
175 of its own property. (People v. Lowndes, 130 N. Y. 455; Haney & Scattergood v. Compton, 36 N. J. L. 507; Geer v. Connecticut, 161 U. S. 519; Corfield v. Coryell, 6 Fed. Cas. 546; Commonwealth v. Hilton, 174 Mass. 29; McCready v. Virginia, 94 U. S. 391.) No citizen has any constitutional right or privilege to

be employed upon public work, or any immunity against discrimination in this respect, either under article 1, section 1, of the Constitution of the state or under the Fourteenth Amendment to the Federal Constitution. The legislature has the right to prescribe who shall work upon its public works. Public works are public property. As such they belong wholly to the sovereign power of the state. The manner in which they shall be built is within the function of the sovereign power to prescribe. This regulation and control is a part of the police power of the state. The police power of the state is not limited to exerting control over private property to promote the general welfare. It is by virtue of this power that the state possesses the exclusive right to construct and control its public property. I am aware that objection has been made to the use of the term "police power" to include the regulation by the state of its internal affairs, on the ground that it uses the terminology that has often been associated with the regulation of private affairs external to the state. Notwithstanding this objection, the nature of the power exerted is the same, whether it is exercised over the public property of the state itself or over the private property of the citizen. The highest judicial authority exists for applying the term "police power" to both public and private property. (New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650; People v. Kerr, 27 N. Y. 188, 213; Haney & Scattergood v. Compton, 36 N. J. L. 507.) In New Orleans Gas Co. v. Louisiana Light Co. (115 U. S. 650, 661) the Supreme Court of the United States, speaking of the police power, said: "We may, not improperly, refer to that power the authority of the state to create educational and charitable institutions, and provide for the establishment, maintenance, and control of public highways, turnpike roads, canals, wharves, ferries, and telegraph lines, and the draining of swamps." Questions of great difficulty may present themselves as to how far the state may impose restraints or limitations upon the exercise of individual rights over private property but no such questions are presented as to public property. Public property is in its very nature subject to social control. The authority of the state over all public works and public undertakings is supreme and this is so whether the public works are undertaken directly by the state or by a municipality or any other agency of the state. Just as the individual may, generally speaking, do what he will with his own, so the state, may exercise a like control over public property. In
176 the same way that private property is subject to individual control, so public property is subject to governmental control. The provisions of the State and Federal Constitutions guaranteeing liberty and property, refer to individual liberty and private property. They do not confer upon the individual, be he citizen or alien, the right to interfere with the use that the state may make of its public property or any regulation which it may prescribe as to the manner in which its public works shall be built. The constitutional safeguards which surround the liberty of the individual confer upon him no right or liberty to engage in public work. The statute under consideration does not involve governmental interference with individual liberty. The attempt of the contractors engaged in public

work to deprive the state of the right to prescribe the conditions upon which the work shall be done, is the assertion of the right of individual interference with the government. The manner in which public works shall be built is a matter wholly within the sphere of social as distinguished from individual control. We cannot lose sight of the fact that there are these separate and distinct spheres of action. It may not be possible to draw with precision the line of demarcation between them, but we all nevertheless recognize that there is a line of demarcation to be drawn. As we deny to the state the right to intrude into the individual sphere of action and to prescribe what we shall believe, and except where the public welfare is involved, what we shall publish, or to supervise private morals, so the state denies to the individual the right to intrude within its social sphere of action and insist that he has a right to be employed upon its public works. The right of state control springs from the public or social character of the work. Owing to the narrow sphere to which the state's activities have, in the past, been limited, the assertion of the state's right of public property seems to have been confined principally to unappropriated lands, waters, wild beasts, fishes and birds, but over those things to which the state's right of property attached the old books recognized the proprietary right of the sovereign power which carried with it the right to discriminate either against subjects or foreigners. (Grotius "Rights of War and Peace," book II, chapter II, § 5.) In recent times the state's proprietary interests have been greatly extended. Over those interests it enjoys the right of a proprietor or owner. The public property of the modern state is not inconsiderable. It owns its highways, harbors, canals, aqueducts, bridges, markets, libraries, art galleries and many other valuable possessions. Over all these things and others of a like nature the state is now proprietor and owner. Its sphere of ownership is being constantly extended. Formerly the functions
177 represented by the public properties enumerated above were left entirely to individual initiative as indeed were also such functions as the army, navy, police and courts of justice now perform. The performance of these services are necessary to the enjoyment of modern social life and the welfare of the citizenship of the state depends upon their proper administration. The uses to which these public properties shall be put are to be determined by the legislature subject only to the Constitution. There are, generally speaking, no provisions of the Constitution that impose limitations upon the exercise of the legislative power over these properties, except such as are inherently attached to the exercise of the police power. Nor is it apparent that this extension of the state's activity has in any way violated the liberty of the citizen. The exercise by the state of these activities may in a negative sense have restricted the liberty of some, but in a positive sense the freedom of all has been increased on account of them. In the building of the state's public work- we have an example through the exercise of the powers of government of the organized co-operation of our citizenship. In its capacity of owner and proprietor, the state is not hampered by restrictions as to the manner in which it shall cause its public works to be constructed.

There are many uses to which an owner or proprietor may put his property which do not violate the rights of others. The state in its capacity of proprietor or owner may make such use of its own public property as it deems conducive to the social well-being. In the use that it makes of such property it is not required to refrain from discrimination. The largest measure of benefit may sometimes result from discrimination. Whether or not discriminations made in regard to public property sustain a relation to the public welfare is for the legislature and not the courts to determine. The modern state, through the ownership of its public property, affords opportunities for public co-operation. The motive which actuates it is service, not profit. Its service, to be effective, must be rendered where it is needed and in rendering it it is not obliged, in the use of its public property, to secure immediate equality of benefits to all; it is sufficient if the ultimate result be to promote the general welfare. The public property or commonwealth should of course be used to promote the general welfare, but the restraints or checks to which government is by constitutional provisions subjected, when it acts in reference to private property, have no application where it acts in relation to public property. Within this sphere and in regard to this public property, government is free to prescribe such regulations as will best promote the general welfare. Where the state has, in a particular sphere, replaced private enterprise, as it has replaced it in the control and building of its public works, it cannot
178 effectively accomplish its purpose if it is to be hampered by the same restraints which are imposed upon it when it exercises its authority over private property. Where it acts in its capacity of proprietor or owner in reference to its own public property, these restraints can only serve to hamper and embarrass the state in the exercise of its rights of ownership. If, in the exercise of the police power, the state may regulate private property to promote the general welfare of its citizens, a fortiori it may, by virtue of that power, exercise control over its own public property.

Public works, like other public property, are within the police power of the state. The character of the work to which the statute under consideration applies being public, the statute itself is an exercise by the sovereign of its police power. The statute being an exercise of the police power of the state it necessarily follows that the provisions of the Fourteenth Amendment of the Federal Constitution and article 1, section 1, of the Constitution of this state, so far as they guarantee the right of individual liberty and property, are without application. As Mr. Justice Field said: "No one has ever pretended, that I am aware of, that the Fourteenth Amendment interferes in any respect with the police power of the state." (Bartemeyer v. Iowa, 18 Wall. 129, 138.) In Olsen v. Smith (195 U. S. 332) it was held that although state laws concerning pilotage are a regulation of commerce, they fall within that class of powers which may be exercised by the states until Congress has seen fit to act upon the subject. In that case the argument was made that the right of a person who is competent to perform pilotage services to render them, is an inherent right guaranteed by the 14th Amendment and that,

therefore, all state regulations providing for the appointing of pilots and restricting the right to pilot to those duly appointed was repugnant to the 14th Amendment. In reply to this contention, Mr. Justice White said: "But this proposition in its essence simply denies that pilotage is subject to governmental control, and therefore is foreclosed by the adjudications to which we have previously referred." (p. 344.) The state has generally speaking, the right to employ upon public work whom it will and to prescribe such conditions as it sees fit to prescribe. It has the right to employ certain citizens to the exclusion of others and the citizens not so employed are not in any legal sense unlawfully discriminated against. As was said by Mr. Justice Harlan in Atkin v. Kansas (191 U. S. 207, 222): "It cannot be deemed a part of the liberty of any contractor that he be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the state. On the contrary, it belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it
179 will permit public work to be done on its behalf, or on behalf of its municipalities. No court has authority to review its action in that respect. Regulations on this subject suggest only considerations of public policy. And with such considerations the courts have no concern." In replying to the contention that a state regulation as to the manner in which public work should be performed was a violation of the liberty of the employee and employer, Mr. Justice Harlan said: "It is sufficient to answer that no employé is entitled, of absolute right and as a part of his liberty, to perform labor for the state; and no contractor for public work can excuse a violation of his agreement with the state by doing that which the statute under which he proceeds distinctly and lawfully forbids him to do." (p. 223.) If the legislature can lawfully discriminate between citizens as to whom it will employ upon its public works, it follows that it can also discriminate as between citizens and aliens. The whole matter as to how public works shall be built rests entirely within the police power of the state. The recognition of this principle seems to me to solve many of the difficulties that otherwise attach to this case. It is manifest that aliens as well as citizens are subject to the exercise of the police power. Nor can it be correctly contended that any treaty that exists between the United States and any foreign government excludes the citizens of that government who reside here from the operation of the police power of the state. If the police power includes, as has been said, "the power to govern men and things" (Munn v. Illinois, 94 U. S. 113, 125), that power does not become less potent when it is applied exclusively to public property being used for public purposes. So far as those trades or callings which are subject to governmental regulations are concerned, it is settled that the state may refuse to grant to aliens, because of the fact of alienage, a license to engage in them. (Patsone v. Pennsylvania, 232 U. S. 138; Commonwealth v. Patsone, 231 Penn. St. 46; McCready v. Virginia, 94 U. S. 391; State v. Travelers Insurance Co., 70 Conn. 590; Matter of O'Neill, 90 N. Y. 584; Opinion of Justice, 122 Mass. 594; Bloomfield v. State, 86 Ohio St. 253.) If the state may debar aliens from participating in those private occupa-

tions or trades which are subject to governmental regulation, as has been held in the cases cited, there is no room for the argument that it cannot debar aliens from working upon its own public works which are wholly subject to its control. In the assertion by the state of its right to control the manner in which public work shall be constructed, it is immaterial whether the public work is done directly by the state or by a municipality or independent contractor. (Atkin v. Kansas, 191 U. S. 207; Ellis v. U. S., 206 U. S. 246; People ex rel. Cossey v. Grout, 179 N. Y. 417.) If the work was private and the public welfare in no way involved, it is clear that the legislature could not deny to the individual employer the right to employ aliens. (Yick Wo v. Hopkins, 118 U. S. 356, 369.) If the work was private, and the exclusion of aliens was in fact necessary to the protection of the public welfare, such exclusion would be within the police power. (Yick Wo v. Hopkins, supra.) Where the work, as in the cases under consideration, is public and, therefore, wholly subject to the police power, the exclusion of aliens need not be shown to sustain any relation to the public welfare in order to be valid. In such case, the exclusion is merely an incident of that social control to which such public works are, in all respects, subject. The fact that the state may exercise complete control over its public works or other public property does not carry with it the right to use its public property so as to violate the rights of either its citizens or aliens to life, liberty or property. The state, no less than the individual, is obligated to so use its public property, except when it acts to promote the general welfare, as not to impair the rights of others. For this reason it cannot lawfully exclude either citizens or aliens from its public highways or deny to either the right to participate in the benefits of those public utilities which it may own and operate and upon the equal administration of which the welfare and happiness of others depend. The limitations to which the state is subject in the construction and use of its public works are only those to which the police power is subject. These restraints it is not now necessary to consider, as they have no application to the exclusion of aliens from working upon public work. It is sufficient, I think, to point out that discriminations on account of race or religion, that sustain no relation to the general welfare are not within the police power.

In my opinion the judgment of the Appellate Division reversing the judgment of conviction should be reversed and the judgment of conviction affirmed.

COLLIN, *J.* (dissenting):

This appeal requires us to determine whether or not section 14 of the Labor Law is a constitutional enactment. The section is:

"§ 14. Preference in employment of persons upon public works.—In the construction of public works by the state or a municipality, or by persons contracting with the state or such municipality, only citizens of the United States shall be employed; and in all cases where laborers are employed on any such public works, preference shall be given citizens of the state of New York. In each contract for the construction of public works a provision shall be inserted, to the

effect that, if the provisions of this section are not complied with, the contract shall be void. All boards, officers, agents or employees of cities of the first class of the state, having the power to enter into contracts which provide for the expenditure of public money
181 on public works, shall file in the office of the commissioner of labor the names and addresses of all contractors holding contracts with said cities of the state. Upon the letting of new contracts the names and addresses of such new contractors shall likewise be filed. Upon the demand of the commissioner of labor a contractor shall furnish a list of the names and addresses of all subcontractors in his employ. Each contractor performing work for any city of the first class shall keep a list of his employees, in which it shall be set forth whether they are naturalized or native born citizens of the United States, together with, in case of naturalization, the date of naturalization and the name of the court where such naturalization was granted. Such lists and records shall be open to the inspection of the commissioner of labor. A violation of this section shall constitute a misdemeanor and shall be punishable by a fine of not less than fifty dollars nor more than five hundred dollars, or by imprisonment for not less than thirty nor more than ninety days, or by both such fine and imprisonment." (Laws of 1909, ch. 36 [Cons. Laws, ch. 31], § 14.)

The defendant, in constructing sewer basins pursuant to a contract between the city of New York and himself, employed persons who were not citizens of the United States, one of whom came from Italy. The judgment of the Court of Special Sessions of the city convicting him of a misdemeanor therein was reversed by the Appellate Division solely for errors of law.

The question before us, necessitating as it does a decision concerning fundamental civic principles, is of unusual gravity. With the wisdom or unwisdom, the justice or injustice of the enactment, or the practical effects of our decision, we have no concern; those matters are within the legislative power and are not subject to review by us. This court has neither the inclination nor the power to encroach upon the legislative department of the government of the state or assume any part of its functions or responsibilities. The measure of our duty is exhausted in ascertaining the legislative intention expressed in the enactment and determining and declaring with cold neutrality that it either does or it does not ignore and transcend the limits which the people of the state, conscious that free government consists largely in rigid restrictions upon itself imposed and acquiesced in by the governed, have placed by the Constitution upon themselves and their representatives. State and people are inseparable ideas, for the state is the form in which the people have become organized.

The statute, through the intent expressed by it, if valid, prohibits the state and all the counties, towns, cities and villages thereof and all contractors with the state or any of those municipalities from employing all persons not born or naturalized in and subject to
182 the United States (Const. of U. S. art. XIV, § 1)—all aliens—in the construction of public works, that is, fixed works for

public use. (Ellis v. Common Council of Grand Rapids, 123 Mich. 567; Ellis v. United States, 206 U. S. 246.) It, in form, deprives contractors with the state or any municipality of the right to employ aliens and it deprives all aliens of the right of being subjects of employment, of the right to offer their labor for wages, in such construction. Its purpose, avowedly, is to promote the welfare of wage-earning citizens by destroying competition from aliens in the construction of all public work within the state. The briefs and arguments of the counsel are in *in* accord with those conclusions.

The respondent asserts that the enactment is in conflict with and, therefore, void under certain provisions of the State and Federal Constitutions. Of those, we cite the following: "No person shall * * * be deprived of life, liberty or property without due process of law." (Const. of State, art. I, § 6.) "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." (Const. of the U. S. art. XIV, § 1.) While the immediate inducement to and purpose in the adoption of this article of the United States Constitution was the protection of the liberty and property of colored persons, it is effective as a guaranty, additional to those of the State Constitutions, against encroachment by the legislatures of the states upon the fundamental and constitutional rights of any person. (Holden v. Hardy, 169 U. S. 366, 382.) It is established, beyond useful questioning or discussion, that aliens equally with citizens are under and protected by the constitutional guaranties invoked by the defendant here. (Yick Wo v. Hopkins, 118 U. S. 356; State v. Montgomery, 94 Me. 192; Commonwealth v. Hanna, 195 Mass. 262.) Within their operation citizen and alien are legal equals and alienage is not and cannot be a basis or justification of differentiation or discrimination between them.

The legislative power of the people of the state is plenary except as they have abridged it by the State Constitution or consented to its restriction by the Federal Constitution. That power is vested in the legislature. The statute under consideration is valid unless it transcends the constitutional restrictions already quoted; if it overpassed them it was and is as inoperative and impotent, as to persons lawfully assailing it, as if non-existent. Whether it did or did not is to be determined upon the general object or purpose sought therein by the legislature and its efficiency to effect it. The purpose
183 of a statute impugned as unconstitutional must be determined from the natural and legal effect of the language employed, and whether it is or is not repugnant to constitutional provisions must be determined from its natural effect when put into operation. (Lochner v. New York, 198 U. S. 45, 64; Henderson v. Mayor, etc., of N. Y., 92 U. S. 259, 268.) The statement already made of the intent and the general purpose to be effected by the statute under consideration need not be repeated.

Constitutional law has always deemed and declared the right to sell or purchase labor a part of the individual liberty and property

safeguarded by the constitutional provisions we have quoted. Refraining from referring to the many judicial expressions of the principle, we quote the most recent of those of the United States Supreme Court: "The principle is fundamental and vital. Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money." (Coppage v. Kansas, 236 U. S. 1, 14.) We have said: "Liberty, in its broad sense as understood in this country, means the right, not only of freedom from actual servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling and to pursue any lawful trade or avocation; all laws, therefore, which impair or trammel these rights, which limit one in his choice of a trade or profession, or confine him to work or live in a specified locality, or exclude him from his own house, or restrain his otherwise lawful movements (except as such laws may be passed in the exercise by the legislature of the police power, which will be noticed later), are infringements upon his fundamental rights of liberty, which are under constitutional protection." (Matter of Jacobs, 98 N. Y. 98, 106.) The principle has been frequently applied. (Bertholf v. O'Reilly, 74 N. Y. 509, 515; People v. Marx, 99 N. Y. 377; People v. Gillson, 109 N. Y. 389; People v. Hawkins, 157 N. Y. 1; People ex rel. Tyroler v. Warden of City Prison, 157 N. Y. 116; People v. Williams, 189 N. Y. 131; Lochner v. New York, 198 U. S. 45; Adair v. U. S., 208 U. S. 161.) Any person who is banned by a statute from employment in the construction of the public works within the state is deprived of liberty and property, any person who is likewise
184 banned from employing any other person in such construction is likewise affected. To constitute the deprivation, the inhibition of the statute need not include employment upon the construction of all works within the state. It need not be universal. The deprivation exists when the right to offer one's labor or services or the right to employ the labor or services of another upon a specified work or at a specified place or time is destroyed. (People v. Williams, 189 N. Y. 131; People v. Hawkins, 157 N. Y. 1; Matter of Tiburcio Parrott, 6 Sawyer [U. S.], 349.) The section 14 effects such deprivation and is unconstitutional and invalid unless there are conditions or legal principles justifying it. The appellants assert that there are.

The appellants assert, and as the chief and predominant support of their position, that the state has the right to declare, in the form of a statutory enactment, whom it and the municipalities will not

employ, and contractors with them shall not employ upon public works and in public undertakings, and is in this respect as free and untrammeled as the individual employer. This claim is unrelated to and seeks no basis or justification in the police power of the state. It is oblivious of the existence of the police power. It rests exclusively upon the principle that the state is the owner and proprietor, as the guardian and trustee for the people, of the public works, undertakings and institutions, and as such proprietor has the right to control, manage and conduct them under such conditions, in such mode and with such employees and appointees as it will, exercising without limit, as may the individual employer, its judgment, choice or caprice. The authority directly relied upon to uphold the claim is Atkin v. Kansas (191 U. S. 207).

In the Atkin case was involved the validity under the Constitution of the United States of the statute known as the eight-hour law of Kansas. The law (speaking generally but with sufficient exactness) constituted eight hours a day's work for persons employed by or on behalf of the state or a municipality, the current rate of per diem wages in the locality where the work was performed, the minimum wage to be paid and the requirement or allowance of more than eight hours' work per calendar day an offense. It provided, further, that persons employed by contractors with the state or a municipality or their sub-contractors should be deemed employees of the state or the municipality. Atkin, in constructing a pavement in Kansas City, under a contract with it, permitted a person employed by him to work ten hours each calendar day, and by a court of Kansas was adjudged guilty of a violation of the statute. The Supreme Court of Kansas and the Supreme Court of the United States affirmed the judgment. The decision of the United States Supreme Court is expressly limited to the facts of that case. It was grounded in the two principles it enunciated: (*a*) The con-
185 struction of the pavement was done by the state through a governmental agency and was of a public character; and (*b*) being of a public character, the statute, in regulating, as to those undertaking it, the mode in which and the conditions upon which it should be executed did not infringe the personal liberty of Atkins or his employees, and expressed a public policy with which the courts had no concern. The court said: "We rest our decision upon the broad ground that the work being of a public character, absolutely under the control of the state and its municipal agents acting by its authority, it is for the state to prescribe the conditions under which it will permit work of that kind to be done. Its action touchin such a matter is final so long as it does not, by its regulations, infringe the personal rights of others; and that has not been done." (p. 224.) Chief Justice Fuller and Justices Brewer and Peckham dissented from this decision. (See, also United States v. Martin, 94 U. S. 400.)

The Atkin case does not authorize or decide the claim of the appellants. It does not reach the basal element of the section 14. The section destroys absolutely the liberty of aliens to contract to work, their right to tender and sell their labor and services, and the right

of the contractors to hire them or buy their labor, in and for constructing any public works. It does not fix the hours of each day through which an alien laborer may work or his compensation; it declares that an alien shall not be permitted to be a laborer and deprives him of the right to exercise the choice and freedom of being willing or unwilling to work upon public works under regulations enacted by the state, and the contractors of the right to employ him. Undoubtedly, no one has an inherent right to work or perform work for the state, which may in the regular and orderly administration and management of its affairs and institutions, in its proprietary capacity, contract as and with whom it chooses, except as restricted by the Constitution, to which it is not superior in any capacity. In the erection of a new capitol, for instance, it could select its architects, its decorators, its contractors and its superintendent and thereby reject the applications of those who were not selected. This, however, differs substantially and inherently from a statutory enactment that in the construction of any public building by or for the state or a municipality only persons residing in the city of Albany shall be engaged or employed. In the absence of the statute every person would be free to offer his labor and ability as he willed, and accept the terms, regulations and conditions fixed by the employer, whether state, municipality or contractor; with the statute every person residing elsewhere than in Albany would be deprived of that freedom, and to that extent of his liberty
186 and property. The reasonable range and effect of a principle under discussion aids in determining its validity. The state is the proprietor of its educational, penal and charitable institutions equally with its public works. The claim of the appellants, if sustained, would establish that it may declare by statutes (apart from the constitutional civil service provisions) that in the administration of those institutions, and of its public works and affairs, only the registered electors of a designated party, or only unmarried persons, or only white persons, or Protestants or Catholics, or persons born in this state, shall be employed or appointed, or that certain designated citizens shall not be employed, or that goods or products made or grown by corporations of this state should not be purchased. The illustrations might be multiplied. The state may not, by virtue of its proprietorship, destroy by a statute the right of any person to tender for sale and sell his labor or services, upon such terms as he deems proper, in the construction of public works, or in the administration of public institutions, or the right of a person contracting to construct public works, to buy the labor or employ the person. The claim of the appellants that the state may with arbitrariness, as an untrammeled proprietor, forbid by statute the employment in the construction of public works of designated persons, or a designated class of persons, is ill-founded, and does not justify the infringement, worked by the section 14, of the personal rights of liberty and property guaranteed to the defendant and the alien class by the State and Federal Constitutions.

The appellants assert further that the section 14 is supportable as

a reasonable exercise of the police power of the state—a power inherent in the state, which the state did not surrender when becoming a member of the United States under the Federal Constitution, and which is exercisable for the preservation or promotion of the public health, safety, morals and general welfare or the prevention of fraud or immorality. While the protection of the liberty and property of the individual is a main purpose of a government and the Constitution, no person or property is immune from the power of the legislature to impose restraints and burdens upon either as required by the public safety or welfare. The cases are numerous and familiar in which the courts have held that the legislature of the states may, by virtue of the police power, limit the enjoyment or control of property and the right of making contracts. Whenever, however, it is sought to justify or support a statute by invoking the police power, it must appear that it reasonably and fairly tends, in a perceptible and clear degree, towards one or more of the objects of that power; and while it is within the general scope of legislative power to determine whether or not there is, in a given condition, necessity for its exercise, it is within the judicial power and duty to determine whether or not the legislative determination bears any reason-
187 able relation to the public health, safety or morals. Unless such relation exists, the determination must be deemed by the courts arbitrary and unjustified by the police power. (Health Department of N. Y. v. Rector, etc., 145 N. Y. 32; Fisher Co. v. Woods, 187 N. Y. 90; Lochner v. New York, 198 U. S. 45; Chicago, B. & Quincy R. R. Co. v. McGuire, 219 U. S. 549; Parks v. State, 159 Ind. 211; Holden v. Hardy, 169 U. S. 366; Dobbins v. Los Angeles, 195 U. S. 223; McLean v. Arkansas, 211 U. S. 539; Coppage v. Kansas, 236 U. S. 1.) It is argued that the section is within the police power because its natural effect, by interdicting competition from the alien class, increases to citizens the likelihood of employment and increased wages. The argument is both ill-founded and pernicious. The constitutional provisions in question were wisely intended and do safeguard the liberty and the property of the aliens lawfully residing in the United States. Under and to the extent of these provisions, they are on an equal footing with citizens. It would be unreasonable heedlessness to assert that the public welfare would be promoted by assuring and compelling unemployment to a class or to classes or to parts of classes of workers in order that those not banished from the right of being employed might have fuller employment and larger compensation. It is argued, too, that there is a danger or a danger to be apprehended in allowing aliens to work upon the public works, because they, through loyalty to the governments to which they owe allegiance, may destroy or diminish the efficiency or safety of those works. The argument is insubstantial, and common knowledge and experience refute it. Persons of unbalanced, evil or uncivilized minds do not form a definable societal class. Each class is infested with them and the law must deal with them as their acts make necessary. In the construction of by far the greater part of the public works opportunities for the commission of the apprehended acts would not exist, and in the alien, as in

the other classes of the state, the number of those who would commit them is an undiscoverable and insignificant minority. Obviously, there are civil positions and offices, and public works of a military, naval or analogous nature, or periods of war in regard to which aliens may, under the police power, be banned or restrained. Section 14 has not a relation in substance or intent to any of those positions or conditions, and the state or a municipality may, in the absence of the statute, deny at any time, and, at least, when conditions justify recourse to the police power, may by contract bind those contracting with them to deny employment to members of a dangerous group or class. I do not perceive in the arguments of counsel, or conceive apart from them, any possible relation of the section to the police power.

188 The further claim of the appellants that the defendant, by undertaking the work, waived the guaranty of the Constitution is not tenable. The transaction between the city and the defendant was a matter of contract. The city through specifications and proposals requested bids for their fulfillment and accepted that made by the defendant. If the statute was valid, it incumbered, through legislative power and not through a meeting of the minds of the parties, the contract made; if invalid, it was, as to the defendant, a nullity.

The respondent urges that the section is repugnant to the Federal Constitution as denying to aliens the equal protection of the laws. The primary question in discussing this assertion is, what is the purpose of the statute. The answer manifestly is, as we have already stated, the promotion of the welfare and prosperity of certain wage-earners by forbidding the employment in the construction of public works of other wageearners.

The second question is, is the purpose constitutionally lawful. We hold it is not, for the reasons stated, and being thus invalid, no arbitrary classification or discrimination between the laborers of the state effecting the unequal protection of the laws can make it more invalid. If it were valid because the state has the power, arbitrarily and in accord with its unfettered and unb-ased will, to prohibit the employment of a class in the construction of its public works, by the same token, it has the power, with like paramountcy, to designate the prohibited class, which could not with reason allege a lack of equal protection of the laws. If it were declared valid because within the police power, it could not be declared invalid on the ground that the equal protection of the law to those whom the exercise of that power had lawfully classified and barred had been invaded. Where the purpose of a statute is lawful, the question might arise whether a classification of persons or things, adopted as a part of the prescribed means for effecting it is legal and justifiable. (Billings v. Illinois, 188 U. S. 97, 102; Patsone v. Pennsylvania, 232 U. S. 138.)

A review of the relevant decisions will disclose that the courts frequently assume that the "due process of law" clause is the equivalent of "the equal protection of the laws" clause. In Holden v. Hardy (169 U. S. 366, 382) the court said: "As the three questions of

abridging their immunities, depriving them of their property, and denying them the protection of the laws, are so connected that the authorities upon each are, to a greater or less extent, pertinent to the others, they may properly be considered together." Professor Willoughby writes: "It would seem, however, that the broad interpretion which the prohibition as to 'due process of law' has received is sufficient to cover very many of the acts which, if committed by the states, might be attacked as denying equal protection. Thus
189 it has been repeatedly declared that enactments of a legislature directed against particular individuals or corporations, or classes of such, without any reasonable ground for selecting them out of the general mass of individuals or corporations, amounts to a denial of due process of law so far as their life, liberty or property is affected." (2 Willoughby on the Constitution, page 874.) Recent decisions verify this statement. (Coppage v. Kansas, supra; Adair v. United States, 208 U. S. 161; Lochner v. New York, 198 U. S. 45; Riley v. Massachusetts, 232 U. S. 671; People v. Marcus, 185 N. Y. 257; Fisher Co. v. Woods, 187 N. Y. 90; People v. Williams, 189 N. Y. 131; City of Chicago v. Hulbert, 205 Ill. 346.) If the "equal protection of the laws" clause be applied, however, it must be held that the attempted classification of the aliens as a prohibited class is unreasonable and arbitrary for the reasons which excluded it from the police power, and for such reasons is unconstitutional and void. (People v. Orange County Road Const. Co., 175 N. Y. 84; Cotting v. Kansas City Stock Yards Co., 183 U. S. 79; Connolly v. Union Sewer Pipe Co., 184 U. S. 540; Southern Ry. Co. v. Greene, 216 U. S. 400; Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61; State v. Hammer, 42 N. J. L. 435, 440.)

In view of what has been written, it is not necessary to determine whether or not the section is repugnant to the existing treaty between the United States and Italy.

My conclusion is that the section 14 unconstitutionally attempted to deprive the defendant as the contractor and employer of labor, and the alien class as the vendors of their labor, of liberty and property, and is void.

The judgment should be affirmed.

Willard Bartlett, Ch. J., Chase, Hogan, Miller and Seabury, JJ., concur with Cardozo, J. (Willard Bartlett, Ch. J., and Seabury, J., in separate opinions); Collin, J., reads a dissenting opinion for affirmance.

Judgment of Appellate Division reversed and judgment of conviction affirmed.

[Endorsed:] People v. Crane. Cardozo, J. Filed Mar. 5, 1915.

190 *Assignment of Errors.*

In the Court of Appeals of the State of New York.

WILLIAM E. HEIM, Plaintiff-Respondent,
against
EDWARD E. MCCALL, MILO R. MALTBIE, J. SARGEANT CRAM, GEORGE V. S. WILLIAMS, and ROBERT C. WOOD, as Members of and Constituting the Public Service Commission for the First District of the State of New York, Defendants-Appellants, and Cranford Company and Flinn-O'Rourke Company, Inc., Defendants-Respondents.

The plaintiff, William E. Heim, and the defendants Cranford Company and Flinn-O'Rourke Company, Inc., and each of them, hereby allege error in the record and proceedings in the above entitled cause as follows:

First. The Special Term of theSupreme Court of the State of New York erred in sustaining the demurrer to the amended complaint and in directing judgment dismissing the complaint.

Second. The Court of Appeals of the State of New York erred in reversing the judgment of the Appellate Division of the State of New York, First Department, which reversed said judgment of the said Special Term and granted to the plaintiff the relief demanded in his amended complaint, and in affirming the judgment of the said Special Term sustaining the demurrer to the amended complaint and dismissing the said amended complaint.

191 Third. The said Special Term and the said Court of Appeals, and each of said courts, erred in refusing to hold, and in overruling the claim of the plaintiff and of the defendants Cranford Company and Flinn-O'Rourke Company, Inc., and each of them, that Section 14 of Article 2 of Chapter XXXVI of the Laws of 1909, comprising Chapter XXXI of the Consolidated Laws of the State of New York, and known as the Labor Law, is repugnant to the Constitution of the United States, particularly to the following articles and sections of the said Constitution and the following articles and sections of the Amendments to the said Constitution, and each of them, in the respects mentioned and otherwise, to wit:

To Article 1, § 10, of the Constitution, in that said § 14 of the Labor Law is an ex post facto law and is a law impairing the obligation of contracts;

To Article 4, § 2, of the Constitution, in that said § 14 of the Labor Law denies to citizens of each State, other than the State of New York, the privileges and immunities granted to citizens of the State of New York;

To Article 6, § 2, of the Constitution, in that said § 14 of the Labor Law contravenes, and is repugnant to the Constitution of the United States and the laws of the United States made in pursuance thereof and certain treaties made under the authority of the United

States, which said Constitution, laws and treaties are the supreme law of the land;

To Article 5 of the Amendments to the Constitution, in that said § 14 of the Labor Law deprives persons of both liberty and property, and each of them, without due process of law, and takes private property for public use without just compensation;

192 To Article 14, Sec. 1, of the Amendments to the Constitution, in that the said Sec. 14 of the Labor Law is a law which abridges the privileges or immunities of citizens of the United States and deprives persons of liberty and property, and each of them, without due process of law, and denies to persons within the jurisdiction of the State of New York the equal protection of the law.

And in holding that said section of said Labor Law was valid and legally prohibited the employment of aliens in work necessary to perform the subway construction contracts described in the amended complaint and legally gave preference to citizens of the State of New York over citizens of other States in such employment, notwithstanding the provisions and guarantees of said United States Constitution and of said treaties.

Fourth. The said Special Term and the said Court of Appeals, and each of said courts, erred in refusing to hold, and in overruling the claim of the plaintiff and of said defendants, that said Section 14 of the Labor Law is repugnant to the treaties of the United States with foreign powers and particularly to the treaty of the United States with the Kingdom of Italy, and hence void.

Fifth. The said Special Term and the said Court of Appeals, and each of said courts, erred in failing and refusing to hold that said Sec. 14 of the Labor Law was invalid because it denied to citizens of other States equal rights and immunities and equal protection of the laws which its own citizens enjoy, and in not recognizing and enforcing, but on the contrary, denying to aliens employed

193 in the construction of the subways mentioned in the amended complaint equal protection of the laws, and the same rights to labor and the immunities and privileges enjoyed by the citizens of the United States.

Sixth. The said Special Term and the said Court of Appeals, and each of said courts, erred in failing and refusing to hold that the said section of the Labor Law was invalid as violating the provisions of the Constitution of the United States and the treaties above referred to, giving and guaranteeing the contractors mentioned in the said amended complaint the right to employ aliens or citizens of other States, and to such aliens and citizens of other States the same right to labor, as exists as regards citizens of the State of New York or of the United States.

Seventh. The said Special Term and the said Court of Appeals erred in holding and deciding that said Sec. 14 of the Labor Law was valid as an exercise of the police power of the State.

Eighth. The said Court of Appeals erred in holding that the moneys and funds provided for the construction of the subways mentioned in the amended complaint were the property of the State

of New York and that the said State had power and right to direct and determine the employees to whom such moneys might be paid, and to exclude aliens.

Ninth. The said Special Term and the said Court of Appeals, and each of said courts, erred in failing and refusing to hold and decide that said Sec. 14 of the Labor Law was in violation of the rights of the City of New York and that, in the construction of the
194 said subways, it is acting not as an agency or arm of the State government, but rather in so doing and in making the contracts providing for their operation and construction, the said City was and is in reality a private corporation and acting as such, and entitled to the same protection and rights under the Constitution of the United States as an individual or private corporation would have under similar circumstances.

Tenth. The said Special Term and the said Court of Appeals, and each of said courts, erred in depriving the said City of New York of its vested rights to build and construct a system of subways which had been inaugurated, and, to a large extent, carried out and constructed, prior to the enactment of the said section 14 of the Labor Law, and the completion of which was essential to the full and complete enjoyment of the said vested rights thus antedating and existing prior to the enactment of the said section of the Labor Law.

Eleventh. The said Special Term and the said Court of Appeals, and each of said courts, erred in failing and refusing to hold that the increased cost of the said subways thus authorized, resulting from the prohibition of the employment of alien labor was the taking of property of the said City of New York without due process of law, and hence said section of the Labor Law was void.

Twelfth. The said Special Term and the said Court of Appeals, and each of said court-, erred in failing and refusing to hold that the people of the State of New York were estopped from enforcing the said section 14 of the Labor Law by reason of the facts stated in the complaint and admitted by the demurrer.

195 Thirteenth. The said Special Term and the said Court of Appeals, and each of said court-, erred in failing and refusing to hold that the construction contracts mentioned in the amended complaint were not of the character of public contracts mentioned in the said section 14 of the Labor Law, and that the said section 14 was never intended to apply to the contracts mentioned in the said amended complaint, or any of them.

Fourteenth. The said Special Term and the said Court of Appeals, and each of said courts, erred in failing and refusing to hold that the said section 14 of the Labor Law was waived by reason of the facts set forth in the amended complaint, and admitted by the demurrer.

Fifteenth. The said Court of Appeals erred in reversing and setting at naught the injunctive relief granted by the Appellate Division of the Supreme Court, First Department, to the following effect:

(*a*) Restraining and enjoin-g the defendants Edward E. Mc-

Call, Milo R. Maltbie, J. Sargeant Cram, George V. S. Williams and Robert C. Wood, as Members of and Constituting the Public Service Commission for the First District of the State of New York, and each and all of them, their deputies, clerks, agents, attorneys and assistants, from declaring any of the contracts mentioned in the amended complaint, and Schedule "A" thereto attached, void or forfeited because of the employment of laborers who are not citizens of the United States and who are not citizens of the State of New York, as specified in the said amended complaint;

(*b*) Restraining and enjoining said Public Service Commission, and the members thereof from refusing and omitting to pre-

196 pare and certify vouchers for eighty-five (85) or ninety (90) per cent of the amounts stated in the monthly estimates made and certified in writing to the said Commission by its Chief Engineer for work done under said contracts in accordance with the practice heretofore followed, as set forth in said amended complaint and as provided for in said contracts.

Sixteenth. The said Court of Appeals erred in dismissing the complaint of the plaintiff and in rendering and directing judgment as shown in its remittitur.

197 Wherefore, The said William E. Heim, Cranford Company and Flinn-O'Rourke Company, Inc., and each of them, pray that the judgment rendered in the above entitled action against them by the Court of Appeals of the State of New York may be reversed, with costs, and relief granted as prayed for in the said William E. Heim's amended complaint.

Dated, New York, March 3, 1915.

THOMAS F. CONWAY,
Attorney for Plaintiff, William E. Heim.

Office and Post-Office Address, 32 Nassau Street, Borough of Manhattan, The City of New York.

EDWARD M. GROUT,
Attorney for Defendants Cranford Company and Flinn-O'Rourke Company, Inc.

Office and Post-Office Address, 115 Broadway, Borough of Manhattan, The City of New York.

[Endorsed:] In the Court of Appeals of the State of New York. William E. Heim, Plaintiff, against Edward E. McCall et al., constituting the Public Service Commission, &c., D'f'ts-App'l'ts. (Copy.) Assignment of errors. Thomas F. Conway, Attorney for Plaintiff. Office address, Mutual Life Building, Borough of Manhattan, 32 Nassau St., N. Y. Filed March 5, 1915.

198 *Petition for Writ.*

UNITED STATES OF AMERICA,
State of New York, ss:

To Hon. Charles E. Hughes, Justice of the Supreme Court of the United States:

The petition of William E. Heim, Cranford Company and Flinn-O'Rourke Company, Inc., respectfully shows:

I. That on the 12th day of December, 1914, the Supreme Court of the State of New York, at a Special Term thereof, rendered a final judgment against the said William E. Heim in a certain cause wherein the said William E. Heim was plaintiff and Edward E. McCall, Milo R. Maltbie, J. Sargeant Cram, George V. S. Williams and Robert C. Wood, as Members of and Constituting the Public Service Commission for the First District of the State of New York, Cranford Company and Flinn-O'Rourke Company, Inc., were defendants, sustaining the demurrer of the defendants Edward E. McCall, Milo R. Maltbie, J. Sargeant Cram, George V. S. Williams and Robert C. Wood, as Members of and Constituting the Public Service Commission for the First District of the State of New York to the said William E. Heim's amended complaint, and dismissing the said amended complaint.

II. That your petitioners duly appealed from the said judgment to the Appellate Division of the said Supreme Court for the First Department of said State, and such proceedings were had upon said appeal that on the 8th day of January, 1915, the judgment above mentioned was reversed and a judgment was rendered in favor of your petitioners and against the defendants Edward E. Mc-
199 Call, Milo R. Maltbie, J. Sargeant Cram, George V. S. Williams and Robert C. Wood, as Members of and Constituting the Public Service Commission for the First District of the State of New York, in and by which it was ordered and adjudged:

"That the demurrer to the amended complaint herein be, and the same hereby is, overruled and that the plaintiff, William E. Heim, recover from the defendants herein Edward E. McCall, Milo R. Maltbie, J. Sargeant Cram, George V. S. Williams and Robert C. Wood, as Members of and Constituting the Public Service Commission for the First District of the State of New York three hundred ninety-four 65/100 dollars ($394.65), his costs as taxed, and that he have execution therefor;"

and in and by which it was further ordered, adjudged and decreed:

"(1) That the Public Service Commission for the First District of the State of New York, and the members thereof, and each and all of them, their deputies, clerks, agents, attorneys and assistants, be restrained and enjoined from declaring any of the contracts mentioned in the said amended complaint and Schedule "A" thereto attached (the description of said contracts in said Schedule "A" being deemed and hereby made a part hereof) void or forfeited because of the employment of laborers who are not citizens of the United

States and who are not citizens of the State of New York, as specified in the said amended complaint; and

(2) That the said Public Service Commission, and the members thereof, be enjoined and restrained from refusing and omitting to prepare and certify vouchers for eighty-five (85) or ninety (90) per cent of the amounts stated in the monthly estimates made and certified in writing to the said Commission by its Chief Engineer for work done under said contracts in accordance with the practice heretofore followed, as set forth in said amended complaint and as provided for in the said contracts."

III. That the defendants Edward E. McCall, Milo R. Maltbie, J. Sargeant Cram, George V. S. Williams and Robert C. Wood, as Members of and Constituting the Public Service Commission for the First District of the State of New York, appealed from said last mentioned judgment to the Court of Appeals of the State of New York, and such proceedings were had upon said appeal that on the 25th day of February, 1915, judgment was rendered in favor of the said Edward E. McCall, Milo R. Maltbie, J. Sargeant Cram, George V. S. Williams and Robert C. Wood, as Members of and Constituting the Public Service Commission for the First District of the State of New York, reversing said judgment entered upon the appeal to the Appellate Division and affirming the judgment of the said Special Term, with costs in all courts.

IV. That the said judgment of the Court of Appeals is final and said court is the highest court in the State of New York in which a decision in said suit could or can be had.

V. That, as your petitioners are informed and believe, the record in the said cause is now in the said Court of Appeals.

VI. That your petitioners claim the right to remove said judgment to the Supreme Court of the United States by writ of error, under Section 1214 of the Compiled Statutes of the United States, because upon the trial of said suit the validity of a statute of the State of New York, to wit, Section 14 of Article 2 of Chapter XXXVI of the Laws of 1909, comprising Chapter XXXI of the Consolidated Laws of the State of New York, and known as the Labor Law, was drawn in question upon the ground that it was repugnant to the following articles, sections and Amendments to the Constitution of the United States, and each of them, to wit:

Article I, section 10 of the Constitution;
Article IV, section 2 of the Constitution;
Article VI, section 2 of the Constitution;
Article V of the Amendments to the Constitution; and
Article XIV, section 1 of the Amendments to the Constitution;

and to the provisions of a treaty of the United States with the Kingdom of Italy and with the provisions of other treaties, and each of them; and the decision of the said Court of Appeals of the State of New York therein was and is in favor of the validity of said statute and against the right claimed by your petitioners under the Constitution and treaties of the United States, all of which will more fully

appear from the record of the proceedings in said cause, a copy of which is herewith submitted.

202 Wherefore, Your petitioners pray for allowance of a writ of error returnable into the Supreme Court of the United States, and for a citation and supersedeas, and your petitioners will ever pray, etc.

WILLIAM E. HEIM,
By THOMAS F. CONWAY, *Attorney.*
CRANFORD COMPANY,
By EDWARD M. GROUT, *Attorney.*
FLINN-O'ROURKE COMPANY, INC.,
By EDWARD M. GROUT, *Attorney.*

STATE OF NEW YORK,
County of New York, ss:

Thomas F. Conway, being duly sworn, says:

I. I am the attorney for the above named William E. Heim, one of the petitioners herein.

II. I have read the foregoing petition and know the contents thereof, and the same is true of my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

THOMAS F. CONWAY.

Subscribed and sworn to before me this 3d day of March, 1915.

[NOTARIAL SEAL.] THOMAS E. O'BRIEN,
Notary Public, Kings Co.

Certificate filed in New York Co.

[Seal Thomas E. O'Brien, Notary Public, Kings Co. Certificate filed in New York Co.]

203 [Endorsed:] Supreme Court of the United States. William E. Heim et al., Plaintiffs in Error, against Edward E. McCall et al., Constituting the Public Service Commission, etc., Defendants in Error. (Original.) Petition for Writ. Thomas F. Conway, Attorney for Petitioner Heim; Office Address, Mutual Life Building, Borough of Manhattan, 32 Nassau Street, New York.

Let the writ issue. March 4, 1915.

CHARLES E. HUGHES,
Associate Justice of the Supreme Court of the United States.

Filed Mar. 5, 1915.

204 *Writ.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Court of Appeals of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of appeals of the State of New York, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between William E. Heim, plaintiff, and Edward E. McCall, Milo R. Maltbie, J. Sargeant Cram, George V. S. Williams and Robert C. Wood, as Members of and Constituting the Public Service Commission for the First District of the State of New York, and Cranford Company and Flinn-O'Rourke Company, Inc., defendants, wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of its being repugnant to the Constitution, treaties and laws of the United States, and the decision was in favor of its validity; or wherein was drawn in question the validity of a treaty or statute of the United States, and the decision was against their validity; or wherein a title, privilege or immunity was claimed under the Constitution, treaties and statutes of the United States, and the decision was against the right, title, privilege or immunity especially set up or claimed under said Constitution, treaties and statutes, a manifest error hath happened, to the great damage of the said William E. Heim, Cranford Company and Flinn-O'Rourke Company, Inc., as by the amended complaint of said Heim appears, we being willing that error, if any hath been, should be duly corrected and full and speedy
205 justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from the date hereof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States ought to be done.

Witness, the Honorable Edward Douglass White, Chief Justice of the United States, this 4th day of March in the year of our Lord one thousand nine hundred and fifteen.

[Seal of the Supreme Court of the United States.]

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

The foregoing writ is hereby allowed.
Dated: Washington, D. C., March 4, 1915.

CHARLES E. HUGHES,
Associate Justice.

206 [Endorsed:] Supreme Court of the United States. William E. Heim et al., Plaintiffs in Error, against Edward E. McCall et al., constituting the Public Service Commission, etc., Defendants in Error. (Original.) Writ. Thomas F. Conway, Attorney for Plaintiff in Error Heim. Office Address, Mutual Life Building, Borough of Manhattan, 32 Nassau Street, New York. Filed Mar. 5, 1915.

207 Court of Appeals, State of New York.

WILLIAM E. HEIM, Plaintiff in Error,
against
EDWARD E. MCCALL, MILO R. MALTBIE, J. SARGEANT CRAM, GEORGE V. S. WILLIAMS, and ROBERT C. WOOD, as Members of and Constituting the Public Service Commission for the First District of the State of New York, Defendants in Error, and Cranford Company and Flinn-O'Rourke Company, Inc., Plaintiffs-in-Error.

Know all men by these presents, that the National Surety Company, a corporation organized and existing under the laws of the State of New York, having an office and principal place of business at No. 115 Broadway, in the Borough of Manhattan, City of New York, is held and firmly bound unto the above named Edward E. McCall, Milo R. Maltbie, J. Sargeant Cram, George V. S. Williams and Robert C. Wood, as Members of and Constituting the Public Service Commission for the First District of the State of New York, in the sum of Five Hundred ($500.00) Dollars, to be paid to the said Edward E. McCall, Milo R. Maltbie, J. Sargeant Cram, George V. S. Williams and Robert C. Wood, as Members of and Constituting the Public Service Commission for the First District of the State of New York, their successors or assigns, to which payment well and truly to be made the said National Surety Company binds itself, its successors and assigns firmly by these presents.

Signed and sealed with its corporate seal this 2d day of March, 1915.

Whereas, the above named William E. Heim, Cranford Company and Flinn-O'Rourke Company, Inc., have prosecuted an appeal by Writ of Error to the United States Supreme Court to reverse a certain judgment rendered in the above entitled action by the Court of Appeals of the State of New York.

Now, therefore, the condition of the above obligation is such, That if the said William E. Heim, Cranford Company and Flinn-O'Rourke Company, Inc., shall prosecute their Writ of Error to effect, and answer all damages and costs if they fail to make their plea good, then this obligation to be void; else to remain in full force and virtue.

NATIONAL SURETY COMPANY,
By L. M. C. ADAMS,
Resident Vice President.

Attest:
E. M. MCCARTHY,
Res. Ass't Secretary.

208 STATE OF NEW YORK,
County of New York, ss:

On this 2d day of March, 1915, before me personally appeared L. M. C. Adams, Resident Vice-President of the National Surety Company, with whom I am personally acquainted, who, being by me duly sworn, said that he resides in the County of New York; that he is the Resident Vice-President of the National Surety Company, the corporation described in and which executed the within instrument; that he knows the corporate seal of said Company; that the seal affixed to the within instrument is such corporate seal; that it was affixed by order of the Board of Directors of said Company, and that he signed said instrument as Resident Vice-President of said Company by like authority, and that the liabilities of said Company do not exceed its assets as determined by an audit of the Company's annual statement filed with the Superintendent of Insurance of the State of New York and certified to by said Superintendent, pursuant to section 2 of chapter 182 of the Laws of the State of New York for the year 1913, amending section 182 of chapter 33 of the Laws of the State of New York for the year 1909, constituting chapter 28 of the Consolidated Laws of the State of New York. And said L. M. C. Adams further said that he is acquainted with E. M. McCarthy and knows him to be the Resident Assistant Secretary of said Company; that the signature of the said E. M. McCarthy subscribed to the said instrument is in the genuine handwriting of the said E. M. McCarthy and was thereto subscribed by the like order of the said Board of Directors and in the presence of him, the said Resident Vice-President.

H. E. EMMETT,
Notary Public.

Copy of By-law.

Be it remembered: That at a regular meeting of the Board of Directors of the National Surety Company, duly called and held on the sixth day of February, 1912, a quorum being present, the following By-Law was adopted:

Article XIII.

SECTION 1. Signatures required.—All bonds, recognizances, or contracts of indemnity, policies of insurance, and all other writings obligatory in the nature thereof, shall be signed by the President, a Vice-President, a Resident Vice-President, or Attorney-in-Fact, and shall have the seal of the Company affixed thereto, duly attested by the Secretary, an Assistant Secretary, or Resident Assistant Secretary. All Vice-Presidents and Resident Vice-Presidents shall each have authority to sign such instruments, whether the President be absent or incapacitated, or not, and the Assistant Secretaries and Resident Assistant Secretaries shall each have authority to seal and attest such instruments, whether the Secretary be absent or incapacitated, or not; and the Attorneys-in-Fact shall each have authority, in the discretion of such Attorneys-in-Fact, to affix to such instru-

ments an impression of the Company's seal, whether the Secretary be absent or incapacitated, or not, or to attach the individual seal of the Attorney-in-Fact thereto, or to use the scroll of the Attorney-in-Fact, or a wafer, wax, or other similar adhesive substance affixed thereto, or a seal of paper or other similar substance affixed thereto by mucilage, or other adhesive substance, or use the word "seal" or the letters "l. s." opposite the signature of such Attorneys-in-Fact, as the case may be.

STATE OF NEW YORK,
County of New York, ss:

I, E. M. McCarthy, Resident Assistant Secretary of the National Surety Company, have compared the foregoing By-Law with the original thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and the whole of said original By-Law.

Given under my hand and the seal of the Company, in the County of New York, this 2d day of March, 1915.

E. M. McCARTHY,
Resident Assistant Secretary.

The foregoing bond approved this 4th day of March, 1915.

CHARLES E. HUGHES,
Associate Justice of the Supreme Court of the United States.

209 The signing and execution of the within bond by William E. Heim, Cranford Company and Flinn-O'Rourke Company, Inc., or any or all of them is hereby waived.

Dated, New York, March 4, 1915.

GEO. S. COLEMAN,
Attorney for Defendants in Error, Edward E. McCall et al., Constituting the Public Service Commission for the First District of the State of New York.

[Endorsed:] In the Court of Appeals of the State of New York. William E. Heim et al., Plaintiff in Error, against Edward E. McCall et al., constituting the Public Service Commission, &c. (Copy.) Bond. Thomas F. Conway, Attorney for Plaintiff in error Heim. Office and post-office address, 32 Nassau St., Borough of Manhattan, the City of New York. Filed Mar. 5, 1915.

210 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To Edward E. McCall, Milo R. Maltbie, J. Sargeant Cram, George V. S. Williams, and Robert C. Wood, as Members of and Constituting the Public Service Commission for the First District of the State of New York:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Court of Appeals of the State of New York, wherein William E. Heim, Cranford Company and Flinn-O'Rourke Company, Inc., are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, Honorable Charles E. Hughes, Associate Justice of the Supreme Court of the United States, this 4th day of March, in the year of our Lord one thousand nine hundred and fifteen.

CHARLES E. HUGHES,
Associate Justice of the Supreme Court of the United States.

211 [Endorsed:] Supreme Court of the United States. William E. Heim, et al., Plaintiffs in Error, against Edward E. McCall, et al., constituting the Public Service Commission, etc., Defendants in Error. (Original.) Citation. Filed Mar. 5, 1915. Thomas F. Conway, Attorney for Plaintiff in Error Heim. Office Address, Mutual Life Building, Borough of Manhattan, 32 Nassau Street, New York. Due and timely service of the within citation is hereby admitted. Dated, March 5, 1915. George S. Coleman, Attorney for Defendants, Edw. E. McCall and others as members of and constituting the Public Service Commission, &c., of the State of New York.

212 STATE OF NEW YORK:

Court of Appeals, Clerk's Office.

I, R. M. Barber, clerk of the Court of Appeals of the State of New York, do hereby certify that the foregoing papers, composed of a copy of the return on appeal in the Court of Appeals in the case of William E. Heim against Edward E. McCall, Milo R. Maltby, J. Sergeant Cram, George V. S. Williams and Robert C. Wood, as members of and constituting the Public Service Commission for the First District of the State of New York, Cranford Company and Flinn-O'Rourke Company, Inc., and the whole thereof upon which the said court acted in rendering judgment therein; the judgment of

the said court thereon and the opinions in the case of The People of the State of New York against Clarence A. Crane, which are the opinions referred to in the memorandum on the decision slip handed down with the decision of this court in the case of William E. Heim against Edward E. McCall, Milo R. Maltby, J. Sergeant Cram, George V. S. Williams and Robert C. Wood, as members of and constituting the Public Service Commission for the First District of the State of New York, Cranford Company and Flinn-O'Rourke Company, Inc., as follows "See opinion in People vs. Crane, decided herewith" are true and correct copies of the originals remaining on file and of record in this office; and that the petition for the writ of error; the writ of error, and the citation to the Supreme Court of the United States, and the admission of service thereof, are the originals thereof, and that the copy assignment of errors and copy bond are true and correct copies of the originals which are on file in this office, and that the whole thereof constitute the return to the writ of error herein.

213 In witness whereof, I have hereunto set my hand and affixed the official seal of the Court at the Capitol in the City of Albany, this fifth day of March, A. D., 1915.

[Seal Court of Appeals, State of New York.]

R. M. BARBER, *Clerk.*

Endorsed on cover: File No. 24,604. New York Court of Appeals. Term No. 386. William E. Heim, Cranford Company, and Flinn-O'Rourke Company, Inc., plaintiffs in error, vs. Edward E. McCall, Milo R. Maltbie, J. Sargeant Cram, George V. S. Williams, and Robert C. Wood, as members of and constituting the Public Service Commission for the First District of the State of New York. Filed March 6th, 1915. File No. 24,604.

7

Office Supreme Court, U. S.
FILED
MAR 8 1915
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM—1914.

No. [redacted] 386

WILLIAM E. HEIM, CRANFORD CO. and FLINN-O'ROURKE COMPANY, INC.,

Plaintiffs-in-Error,

AGAINST

EDWARD E. McCALL, MILO R. MALTBIE, J. SARGEANT CRAM, GEORGE V. S. WILLIAMS and ROBERT C. WOOD, as Members of and constituting the Public Service Commission for the First District of the State of New York,

Defendants-in-Error.

Motion by Plaintiff-in-Error, William E. Heim, to Advance.

THOMAS F. CONWAY,
Attorney for Plaintiff-in-Error, Wm. E. Heim,
Office Address, Mutual Life Building,
32 Nassau Street,
Borough of Manhattan,
New York.

HIGGINS & HIGGINS INC., PRINTERS, NEW YORK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM—1914.

WILLIAM E. HEIM, CRANFORD COMPANY and FLINN-O'ROURKE COMPANY, INC.,
Plaintiffs-in-Error,

against

EDWARD E. MCCALL, MILO R. MALTBIE, J. SARGEANT CRAM, GEORGE V. S. WILLIAMS and ROBERT C. WOOD, as Members of and Constituting the Public Service Commission for the First District of the State of New York,

Defendants-in-Error.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

STIPULATION FOR ADVANCE OF CASE FOR ARGUMENT.

It is hereby stipulated and agreed between the counsel for the respective parties hereto,

(1) that notice of motion to advance this case be and the same hereby is waived and dispensed with;

(2) that this court may advance this case for hearing at an early day convenient to the court during the present term; and

(3) that the time of counsel to file briefs herein, be extended, with the consent of the court, to the day of the hearing of the argument of the case, and that service of briefs herein be and the same hereby is waived.

Dated, March 6, 1915.

THOMAS F. CONWAY,
Attorney for Plaintiff-in-error, William E. Heim.

EDWARD M. GROUT,
Attorney for Plaintiffs-in-error, Cranford Company and Flinn-O'Rourke, Company, Inc.

GEORGE S. COLEMAN,
Attorney for Defendants-in-error, Edward E. McCall, Milo R. Maltbie, J. Sargeant Cram, George V. S. Williams, and Robert C. Wood, as Members of and Constituting the Public Service Commission for the First District of the State of New York.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM—1914.

WILLIAM E. HEIM, CRANFORD COMPANY and FLINN-O'ROURKE COMPANY, INC., Plaintiffs-in-Error,

against

EDWARD E. MCCALL, MILO R. MALTBIE, J. SARGEANT CRAM, GEORGE V. S. WILLIAMS and ROBERT C. WOOD, as Members of and Constituting the Public Service Commission for the First District of the State of New York,

Defendants-in-Error.

MOTION BY PLAINTIFF-IN-ERROR WILLIAM E. HEIM TO ADVANCE.

Comes now the plaintiff-in-error William E. Heim, in the above entitled case, the other plaintiffs-in-error and the defendants-in-error and each of them consenting, as evidenced by their stipulation, dated March 6, 1915, duly signed and filed herewith, and moves the court to advance said case for hearing at an early day convenient to the court during the present term.

This case involves the constitutionality of an act of the Legislature of the State of New York which originated in Chapter 622, of the

Laws of 1894, and which in its present form is Chapter 31 of the Consolidated Laws of the State of New York, and is known as Section 14 of the Labor Law, being Section 14 of Article 2 of Chapter 36 of the Laws of 1909.

The said Section 14 of the Labor Law provides as follows:

> "SECTION 14. *Preference in employment of persons upon public works.*
>
> In the construction of public works by the state or municipality or by persons contracting with the state or such municipality, only citizens of the United States shall be employed; and in all cases where laborers are employed on any such public works, preference shall be given citizens of the State of New York. In each contract for the construction of public works a provision shall be inserted, to the effect that, if the provisions of this section are not complied with, the contract shall be void. All boards, officers, agents or employees of cities of the first class of the state, having the power to enter into contracts which provide for the expenditure of public money on public works, shall file in the office of the commissioner of labor the names and addresses of all contractors holding contracts with said cities of the state. Upon the letting of new contracts the names and addresses of such new contractors shall likewise be filed. Upon the demand of the commissioner of labor a contractor shall furnish a list of the names and addresses of all sub-contractors in his employ. Each contractor performing work for any city of the first class, shall keep a list of his employees, in which it shall be set forth whether they are naturalized or native born citizens of the United States, together with, in case of naturalization, the date of naturalization and the name of the court where such naturalization was granted. Such list and records shall be open to the inspection of the

commissioners of labor. A violation of this section shall constitute a misdemeanor and shall be punishable by a fine of not less than fifty dollars nor more than five hundred dollars or by imprisonment for not less than thirty nor more than ninety days, or by both such fine and imprisonment."

Before this Court, the plaintiffs-in-error seek to review the decision and judgment of the Court of Appeals of the State of New York, sustaining a demurrer to the amended complaint of the plaintiff-in-error Heim, upon the ground that it did not state facts sufficient to constitute a cause of action and dismissing the amended complaint with costs. Previous to said decision and judgment of the Court of Appeals, the Special Term of the Supreme Court had sustained the said demurrer and dismissed the said amended complaint, but on appeal to the Appellate Division, the judgment of the Special Term had been unanimously reversed and judgment directed in favor of the plaintiff-in-error Heim for the relief demanded in the amended complaint, viz.: Enjoining the Public Service Commission from declaring any of the contracts mentioned in the said amended complaint void or forfeited because of the employment of laborers who are not citizens of the United States and who are not citizens of the State of New York, and enjoining their refusal to pay monthly estimates to contractors "in accordance with the practice heretofore followed."

The decision of the Court of Appeals, which reversed the decision and judgment of the Appellate Division and affirmed the decision and judgment of the Special Term, was by a divided court.

After suit was brought, and on the application of the attorneys for the defendants Cranford

Company and Flinn-O'Rourke Company, Inc., they were made parties defendant, on the ground that they held certain of the contracts, the validity of which, it was claimed, might be affected by the decision of the case. These contracts are referred to in the complaint with others existing and which the plaintiff alleged were to be wrongfully terminated (fols. 119, 139 to 170). These last named defendants have not yet answered, but in the Courts below were represented by counsel and united in the request for the relief demanded by the plaintiff. On the argument in the courts below Mr. John A. Gill was allowed to appear as *amicus curiae* by his attorney.

The case was advanced upon the calendar of each court, which has passed upon it, on the request of all parties, because of the importance and urgency of having an early and final decision of the questions involved.

A writ of error to the Court of Appeals was granted by Mr. Justice Hughes of this Court on March 4, 1915, and a return made to the said writ by the said Court of Appeals on March 5, 1915, which, as counsel is informed and believes, was filed in this Court on March 6, 1915, and, as counsel is informed and believes, the case was docketed in this court on said March 6, 1915.

On March 4, 1915, this Court, on application of the plaintiffs-in-error, granted an injunction, pending the writ of error, by an order which provided as follows:

> "WHEREAS, the plaintiffs-in-error have applied for an injunction restraining the defendants-in-error during the pendency of this cause as the result of the writ of error heretofore allowed and until its final determination or until otherwise ordered, from in any way terminating any or all of the construc-

tion contracts mentioned and described in said action below.

AND WHEREAS, the granting of the relief thus prayed is essential to the preservation of the *status quo* concerning the rights of the parties under said contracts until the same can be determined by final decree under the pending writ of error.

NOW, THEREFORE, it is ordered by the Court that the prayer for injunction pending the writ of error in this court until the same is finally disposed of or until the Court orders to the contrary, be, and the same is hereby, granted.

THEREFORE, it is ordered that an injunction be, and the same is hereby, directed to issue restraining Edward E. McCall, Milo R. Maltbie, J. Sargeant Cram, George V. S. Williams and Robert C. Wood, as members of and constituting the Public Service Commission for the First District of the State of New York, defendants-in-error herein, their agents, servants and attorneys, and each and all of them, severally and as a body, from terminating any or all of the construction contracts mentioned and described in the action herein pending under this writ of error, or from in any manner disturbing the *status quo* of said contracts by refusing to fully comply with and carry out the same in all respects because of any contention or cause which is involved in the controversy concerning said contracts now pending in this court under the writ of error heretofore granted, the injunction thus directed to be issued to remain in full force and effect until the final decision of this Court or until the same is modified or changed by some further order."

As will more fully appear by the return of the Court of Appeals to the writ of error herein, the facts set forth in the amended complaint, and admitted by the demurrer, are as follows:

The plaintiff is a taxpayer and as such brought

this action under the authority of Section 1925 of the Code of Civil Procedure, Section 51 of the General Municipal Law, and Section 59 of the charter of The City of New York to restrain and prevent acts alleged to be illegal, threatened and about to be done by the Public Service Commission for the First Department of the State of New York, composed of the individual defendants; and also to prevent waste of the public funds of the city, and damage and injury to the residents and taxpayers thereof. (Fols. 57, 121-130.)

The following facts stated in the complaint will show the threatened acts alleged to be illegal, and the grounds upon which the plaintiff seeks to have them enjoined:

In the year 1891 the Legislature of the State enacted what was known as the Rapid Transit Act, authorizing the construction and operation by the city of subway railroads for public convenience and benefit. (Fol. 59.) Pursuant to the authority conferred by the act and the amendments thereof, the city entered into a contract known as Contract No. 1, with John B. McDonald, in September, 1900, for the construction of the subway routes described in it, and later entered into what is known as Contract No. 2, for the construction of another portion thereof, which routes practically constitute the existing subway as now operated. (Fols. 59-60.)

Railroads were constructed and completed on the routes described in Contract No. 1, and the same put in operation in the fall of 1904. Thereafter the railroad was built upon the route described in Contract No. 2, and has been completed and in operation for several years. (Fols. 59-60.) Still later, and pursuant to the authority contained in the said Rapid Transit Act,

and certain amendments thereafter made to it, the Public Service Commission, in conjunction with the Board of Estimate and the city authorities, determined upon many extensions to the existing subway, and their connection therewith, which was owned by the city and operated under lease by the Subway Construction Company, and also their connection with existing surface and elevated roads, owned by private corporations, with a view of furnishing a comprehensive system of rapid transit for the benefit of the City of New York, on the basis of a single five-cent fare, with general transfer privileges. (Fols. 63, *et seq.*)

The plan contemplated and provided for the ownership by the city of all new subways to be built. It also contemplated and provided that in view of the fact that the city did not have sufficient funds and could not raise the same without exceeding the debt limit to which it was restricted by statute and the Constitution, private capital must be supplied by individuals or corporations sufficient in whole or in part to complete said system, in conjunction with the moneys available for that use by the city, and that its equipment for operation should be wholly provided for by private capital; that a lease of the said system when completed might be made with the party or parties who would supply the capital for construction and equipment as stated. (Fols. 70, *et seq.*)

In pursuance of said plan, bids were called for by the Public Service Commission for construction, equipment and operation of the whole system, and simultaneously bids were also invited for construction of the different sections of said routes thus planned. (Fol. 93.) No bids were received for equipment, construction and opera-

tion, but many bids were received on different sections of the routes for construction only in the year 1909. (Fol. 159.)

Negotiations were thereafter taken up by the Public Service Commission and the Board of Estimate with the Interborough Rapid Transit Company, and the Brooklyn Rapid Transit Company, with a view of entering into agreements with said companies to supply the capital requisite for the construction and equipment of the routes, or so much thereof as the city was not in a position to provide. (Fols. 70, *et seq.*)

The outcome of the negotiations and plans of the City and Public Service Commission, was the contracts in the year 1913 for construction, equipment and operation with the Interborough Company and the New York Municipal Railway Corporation, described in the complaint. (Fols. 72-87.)

As appears more fully from the provisions set forth in the complaint, the Interborough Company was to supply one-half of the cost, not exceeding $58,000,000, for the construction of the routes described in its contract, and the entire cost of equipping the same for operation, and the city the balance. (Fol. 76.)

The New York Municipal Railway Corporation, which was formed in the interests of the Brooklyn Rapid Transit Company, agreed to supply $13,500,000.00 for equipment of the portion of the routes it was to construct under its contract, and $26,000,000.00 for improvements and extensions to its own existing system, which it agreed to connect with the new routes and operate upon a basis of a single fare of five cents, with general transfer privileges. (Fols. 81-87.) The Interborough Company also agreed to operate the portion of the route it constructed in connection with

the existing subway and other roads controlled by it on the basis of a five cent fare, with transfer privileges. Leases were to be given to the Interborough in the one instance, of the route it was to lease and operate, and to the New York Municipal Railway Corporation in the other of the route it was to lease and operate, for given terms, with the right of recapture by the City after ten years on certain terms fixed in the contracts. (Fols. 77, 83.)

In the case of the Interborough Company, the receipts from existing and new subway lines were to be pooled, and from the gross receipts of both lines there were to be deducted and paid in the order named (deficits to be cumulative with compound interest):

(a) Operating expenses; allowance for depreciation, renewals and obsolescence; taxes, insurance and rentals payable to the City under existing subway contracts.

(b) A sum to be retained by the company amounting to $6,335,000 per annum, representing the average annual income received by it from the operation of the existing subway lines and equipment for the two fiscal years ending June 30, 1911.

(c) A sum to be retained by the company equal to 6% per annum upon the investment of the Interborough Company in the new lines, estimated at $80,000,000 or $58,000,000 for new construction and $22,000,000 for new equipment.

(d) To be paid to the City the interest and sinking fund upon the bonds issued by the City for the construction of new lines and in addition such further sum as will bring the payments to

be made to the City up to an amount equal to 8.76% upon its expenditures.

(e) Any amount remaining to be divided equally between the City and the company share and share alike. (Fol. 80.)

In the case of the New York Municipal Railway Corporation, the receipts from the existing system and the new subway lines were to be pooled, and from the gross receipts of both lines there were to be deducted and paid in the order named (deficits to be cumulative):

(a) Cost of operation which shall include operating expenses, taxes, rentals of leased property used in operation and allowance for depreciation and renewals.

(b) A sum to be retained by the Company amounting to $3,500,000 per annum representing the average annual income of the New York Consolidated Railroad Company from the operation of its existing lines.

(c) A sum to be retained by the company equal to six per centum per annum upon the investment of the company in the new lines.

(d) To be paid to the City interest and sinking fund charges upon bonds issued by the City.

(e) Any amount remaining to be divided equally between the City and the company share and share alike. (Fol. 87.)

In the negotiations which resulted in said contracts, it was determined that the time required for construction and equipment of the routes to be constructed and equipped by the Interborough Company should not exceed four years, and in regard to the routes to be constructed by the New

York Municipal Railway Corporation that the same should be constructed and equipped and put in operation during the same time, and the contracts themselves so provide, so that the dual system should be completed and in operation in the year 1917.

It was recognized that the Rapid Transit Act and its amendments as it then stood did not authorize the carrying out of the plans and the making of the contracts on the basis stated. Thereupon the legislature was appealed to and by amendment to the Act, Chapter 226 of the Laws of 1912, conferred ample powers upon the Public Service Commission and the City to carry out the plans mentioned and to enter into the contracts referred to.

Contracts have been let for construction of various sections, as set forth in the complaint, to the various contractors therein mentioned, amounting in all to $111,918,256.58. They are in the process of performance at different stages, some of them being completed to the extent of 75% and more, and the contracts in each instance requiring completion at fixed dates well within the time contemplated by the plan and the contracts with the Interborough and the New York Municipal Railway Corporation for putting the dual system in operation. (Fol. 102.)

It is further set forth that during the performance of Contracts Nos. 1 and 2, alien labor was employed to a large extent, and necessarily employed without objection, and that in each of the contracts for construction set forth in the complaint the contractors are and have been from the beginning of work thereunder, largely employing alien labor, without objection from anyone until a very short time since, when certain citizens of the City insisted that under Section 14

of the Labor Law the employment of alien labor was forbidden, and the effect of such employment was a forfeiture of all contracts in the performance of which such labor was employed; that the contractors in making their bids and executing their contracts regarded said section of the Labor Law as void. (Fols. 102-119.)

It is further set forth that there is an insufficiency in the supply of citizen labor, and that it will be impossible to complete the Dual System within the time contemplated if such labor may not be employed, or to do the work called for within the amounts estimated and provided for the same pursuant to said plans, namely, $212,000,000. That it will also be impossible for the various contractors to perform their contracts within the time called for by them or for the amounts therein fixed, unless such labor be employed. (Fols. 76, 81, 102, 107.)

That the contracts in each instance with the various contractors, provide that the chief engineer of the Public Service Commission shall each month furnish to the Commission his estimate of the value of all work done during the preceding month, and that said Commission thereupon shall approve the same, and 85% or 90% of the amount thus estimated and approved the Comptroller shall issue his warrant for and the contractor receive, in order to enable him to do the work and meet the expenditures called for by the contract. (Fols. 110-117.) That without such monthly payments the contract work must be stopped as the contractors cannot and will not proceed therewith. (Fol. 117.)

That after receiving notice from said citizens that contractors were employing alien labor in disregard of the provisions of Section 14 of the Labor Law, which were made a part of their con-

tracts by reference to it and agreement to observe it, said Public Service Commission threatened to and were about to terminate all of said subway contracts on account of such violation of the Labor Law, which worked a forfeiture of them. They also refused to certify the monthly estimates of the engineer so as to enable the contractors to get their pay, and threatened to continue to do so. (Fols. 118-120.)

Thereupon this suit was brought by the plaintiff to restrain and enjoin the Public Service Commission from terminating said contracts, and also requiring them to continue to approve the engineers' monthly estimates for the work done, the plaintiff claiming that Section 14 of the Labor Law was null and void as being repugnant to the provisions of the constitutions of the State of New York and the United States, and also to treaties existing between this country and the Kingdom of Italy, and other foreign nations, securing to their citizens the same rights as citizens of the United States. (Fol. 99.)

It is also alleged that the Interborough Company is a party to many of the contracts for construction. also that the New York Municipal Railway Corporation, as well as the various contractors have contract rights which have been violated by the said illegal acts, to the great injury of plaintiff and all the taxpayers of the city. (Fols. 125-129.)

The nature and extent of the injury and damage sought to be prevented in this action, and the illegal acts, may be briefly indicated as follows (Fols. 121, *et seq.*):

(1) The contracts already in existence at different stages of completion are eighty-one in number and aggregate $111,918,256.58. Each of these contractors will have a good cause of ac-

tion against the City for the recovery of anticipated profits in case said contracts are improperly terminated, which will likely aggregate an enormous sum and for which the City will have received no return.

(2) The City will be involved in most extensive and expensive litigation.

(3) The completion of the subway system will be indefinitely delayed, if not wholly prevented.

(4) The estimated cost of construction provided for under said contracts with the Interborough Company and the New York Municipal Railway Corporation will be largely exceeded, the purpose of said contracts probably defeated, and the public deprived of the benefit of the subway sytsem as planned and the money already expended by the City will have been wasted.

(5) The situation in regard to subway contracts will be thrown into chaos and confusion and the situation in regard to other municipal contracts will be little, if any, better.

(6) The corporate rights of the city will be violated.

(7) The right secured to aliens under our Federal Constitution as well as by existing treaties, will be violated not only to their injury and damage but to the injury and damage of the public, and in violation of the policy of and treaties with the United States Government.

(8) The rights of contractors will be violated in that their right to employ such labor as they choose will be denied, and their contracts forfeited.

(9) A reduction in labor available will increase the cost of the same and thus bring an added and

unwarranted burden upon the city and its taxpayers.

Among the legal questions arising in the case upon the pleadings and under the judgment to be reviewed by this Court pursuant to the writ of error, as will more fully appear from the assignment of errors, a copy of which is made a portion of the return of the Court of Appeals to the writ of error herein, are:

(1) Is Section 14 of the Labor Law repugnant to the Constitution of the United State, particularly to the following articles and sections of said Constitution and the following articles and sections of the Amendments to said Constitution?

To Article 1, §10, of the Constitution, in that said §14 of the Labor Law is an *ex post facto* law and is a low impairing the obligation of contracts;

To Article 4, §2, of the Constitution, in that said §14 of the Labor Law denies to citizens of each State, other than the State of New York, the privileges and immunities granted to citizens of the State of New York;

To Article 6, §2, of the Constitution, in that said §14 of the Labor Law contravenes, and is repugnant to the Constitution of the United States and the laws of the United States made in pursuance thereof and certain treaties made under the authority of the United States, which said Constitution, laws and treaties are the Supreme law of the land;

To Article 5 of the Amendments to the Constitution, in that said §14 of the Labor Law deprives persons of both liberty and property, and each of them, without due process of law, and takes private property for public use without just compensation;

To Article 14, Sec. 1, of the Amendments to the Constitution, in that the said Sec. 14 of the Labor Law is a law which abridges the privileges or immunities of citizens of the United States and deprives persons of liberty and property, and each of them, without due process of law, and denies to persons within the jujrisdiction of the State of New York the equal protection of the law.

(2) Is the said Section 14 of the Labor Law repugnant to the treaties of the United States with foreign powers, and particularly to the treaty of the United States with the Kingdom of Italy, which provides, among other things, as follows:

> " 'The citizens of each of the High Contracting parties shall receive in the States and Territories of the other the most constant security and protection for their persons and property and for their rights, including that form of protection granted by any State or national law which establishes a civil responsibility for injuries or for death caused by negligence or fault and gives to relatives or heirs of the injured party a right of action, which right shall not be restricted on account of the nationality of said relatives or heirs; and shall enjoy in this respect the same rights and privileges as are or shall be granted to nationals, provided that they submit themselves to the conditions imposed on the latter.' "

(3) Is said Section 14 of the Labor Law repugnant to the Constitution of the United States, in that it denies to citizens of other States equal rights and immunities and equal protection of the laws which its own citizens enjoy, and in that it denies to aliens employed in the construction

of the subways mentioned in the amended complaint equal protection of the laws and the same rights to labor and the immunities and privileges enjoyed by the citizens of the United States?

(4) Is the said Section 14 of the Labor Law repugnant to the Constitution of the United States and the treaties above referred to, in denying to the contractors mentioned in the said amended complaint the right to employ aliens and citizens of other States, and to such aliens and citizens of other States the same right to labor as exists as regards citizens of the State of New York and of the United States?

(5) Is said Section 14 of the Labor Law valid as an exercise of the police power of the State?

(6) Are the moneys and funds provided for the construction of the subways above mentioned the property of the State of New York and has that State the power and right to direct and determine the employees to whom such moneys might be paid and to exclude aliens?

(7) Is said Section 14 of the Labor Law in violation of the rights of the City of New York, and is said City, in the construction of the subways mentioned in the amended complaint and in making the contracts providing for their operation and construction, a private corporation and acting as such, and not an arm or agency of the State government and entitled to the same protection and rights under the Constitution of the United States as an individual or private corporation would have under similar circumstances?

(8) Does Section 14 of the Labor Law deprive the City of New York of its vested rights to build and construct the system of subways which had

been inaugurated and, to a large extent, carried out and constructed prior to the enactment of the said Section 14 and the completion of which was essential to the full and complete enjoyment of the said vested rights, thus antedating and existing prior to the enactment of the said section of the Labor Law?

(9) Is the said Section 14 of the Labor Law void because the increase of the cost of said subways thus authorized, resulting from the prohibition of the employment of alien labor, was the taking of property of the said City of New York without due process of law?

(10) Were the People of the State of New York estopped from enforcing the said Section 14 of the Labor Law?

(11) Have the People of the State of New York waived the enforcement of said Section 14 of the Labor Law and its provisions, by reason of the facts set forth in the amended complaint and admitted by the demurrer?

(12) Were the construction contracts mentioned in the amended complaint of the character of public contracts mentioned in Section 14 of the Labor Law, and was that section ever intended to apply to the contracts mentioned in the said amended complaint, or any of them?

As stated in the prevailing opinion of the Court of Appeals,

> "There is a like provision in the Constitution of Arizona (Art. 18, §10), a Constitution which was approved (so far as this provision is concerned) by joint resolution of Congress (37 U. S. Stat. at Large, p. 39). There are like provisions in the Constitution of Idaho (Art. 13, §5), and in that of Wyoming (Art. 19, §1), which were also ap-

> proved by Congress. There is a like provision, restricted, however, to Chinese, in the Constitution of California (Art 19, §3). There are like provisions applicable to all aliens in the statutes of Massachusetts (Acts of 1909, chap. 514, §21), New Jersey (Compiled Statutes of New Jersey, 1910, p. 3023, §15), Pennsylvania (Purdon's Digest, 13th ed., vol. 2, p. 2172, §8) and California (California Code, 1906, Act. No. 127, General Laws of California). Legislation similar in purpose may be found in Montana (Revised Code, §2250), Nevada (Revised Laws of Nevada, 1912, §3483), Oregon (Laws of Oregon, §6267) and Hawaii (Acts of Congress, Revised Laws 1905),"

and the State of Arizona has recently enacted a statute which prohibits the employment of aliens by private corporations to an extent greater than a certain percentage fixed by the statute. As the undersigned is informed and believes, said Arizona statute has been declared unconstitutional by a Federal Court of the district comprising the State of Arizona, and the record on appeal or writ of error is now on file with the Clerk of this Court. It is probable that in many of these States numerous cases will arise wherein the validity of such legislation will be drawn into question. It is not only a matter of wide public concern that the validity of such legislation shall be determined by this Court,, but it is necessary to have an early hearing in this case, in order to avoid multiplicity of suits in all parts of the United States on practically the same questions as those involved in this case.

The Federal questions raised in this case are in connection with a State statute different from any State statute which has heretofore been passed upon by this Court.

At the present time, in the State of New York, substantially all work under contract to be done for the State, the various counties, cities, towns and villages, which involves the employment of men in the lower grades of manual labor, is at a standstill or the validity of contracts for the same drawn in question. Among other improvements directly affected by the decision and judgment of the Court of Appeals, besides the subway and rapid transit system involved in this case, are the aqueduct for the necessary increase of the water supply for the City of New York, the barge canal and terminals for a new State canal system and the improvements of waterways throughout the State generally, highway and sewer construction, pavement construction, and the erection and repair of public buildings.

As the undersigned is informed and believes, there are proposed additional subway construction contracts covering work, aggregating in cost approximately Fifty Million Dollars ($50,000,000) which the Public Service Commission of the First District of New York, the defendants-in-error, are ready to advertise and let, but said Commission deems it unsafe to advertise or let the same or any of them, pending the final decision of this Court in this case, and refuses to advertise or let such contracts or any of them.

I, therefore, pray that this application be granted and that the date of the hearing be advanced upon the day calendar of this Court to as early a date, within reasonable limits, as the Court may deem proper.

Respectfully submitted,

THOMAS F. CONWAY,
Attorney for Plaintiff-in-error,
William E. Heim.

State of New York, }
County of New York, } ss.:

Thomas F. Conway, being first duly sworn, on his oath says:

That he is the atorney for the plaintiff-in-error William E. Heim in the above entitled case and that he has read the statements contained in the foregoing motion and that said statements are true.

THOMAS F. CONWAY.

Subscribed and sworn to before me this 6th day of March, 1915.

Thomas E. O'Brien,
Notary Public,
(Notarial Seal) Kings Co.,
Certificate filed in New York County.
My commission expires March 30, 1915.

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1. The judgment was erroneous because it was based upon a violation of Section 14 of Chapter 36 of the Laws of 1909 of the State of New York, known as the Labor Law, which law was void, being in conflict with Section 1 of the Fourteenth Amendment of the United States Constitution which provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." 6

Said Section 14 of the Labor Law did abridge the privileges and immunities of plaintiffs in error, citizens of the United States and of their alien employees by depriving them of their right to contract for labor, and the State of New York, by enacting said law and enforcing its provisions against plaintiffs in error deprived them and their said employees of liberty and property without due process of law and denied to them the equal protection of the laws. The Court of Appeals of the State of New York erred in holding to the contrary.

2. The judgment was erroneous because it was based upon the provisions of Section 14 of Chapter 36 of the Laws of 1909 of the State of New York, known as the Labor Law, which law was void, being in conflict with subdivision 2 of Article VI of the United States Constitution which provides that "this Constitution and the Laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." Pursuant to said article treaties had been entered into by the United States with various nations including Italy, which treaties were in effect at the time of the act complained of and at the time of his conviction, and which put aliens within the State of New York upon an equality with citizens of 6

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the state with respect to the right to labor upon public works, and Congress had pursuant to said Section duly enacted a law (Revised Statutes, Sec. 1977) granting to all persons within the jurisdiction of the United States the same right in every state and territory to make and enforce contracts as is enjoyed by white citizens. Said treaties and said law nullified the provisions of said Section 14 of the Labor Law, and the Court of Appeals of the State of New York, erred in holding to the contrary.

Points—

Point I.—The Fourteenth Amendment of the United States Constitution, either ex proprio vigore, or by virtue of treaties entered into, and laws of Congress enacted, pursuant to the provisions of Article VI of the Constitution, has granted to resident aliens in the State of New York an equal right with citizens of that State to contract to labor upon the public works of the State, and chapter 14 of the Labor Law of the State, being in contravention of that right, was and is unconstitutional and void, and the judgment dismissing the complaint was error, and should be set aside. 8

(*a*) Authority for this law does not lie in the police power. 18

(*b*) The distinction between citizens and aliens is insufficient to justify the act. 28

(*c*) Nor is freedom to contract sufficient justification for the law. 30

(*d*) Section 14 of the Labor Law violates the Fourteenth Amendment of the Constitution of the United States, reinforced as it is by section 1977 of the Revised Statutes. 33

(*e*) Section 14 of the Labor Law also violates treaties duly entered into by the United States Government with foreign nations, and Section 1977 of the Revised Statutes. 45

Point II.—The contract agreement to comply with the law falls with the law itself. 67

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Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 386.

William E. Heim, Cranford Company and Flinn-O'Rourke Company, Inc., Plaintiffs-in-Error, *against* Edward E. McCall, Milo R. Maltbie, J. Sergeant Cram, George V. S. Williams and Robert C. Wood, as members of and constituting the Public Service Commission for the First District of the State of New York.	File No. 24604.

Brief for Plaintiffs-in-Error Cranford Company and Flinn-O'Rourke Company, Inc.

Statement of the Case.

The plaintiffs-in-error seek to review upon writ of error to this Court a judgment of the Court of Appeals of the State of New York reversing the determination of the Appellate Division of the Supreme Court of the State of New York which reversed the judgment of the Supreme Court at Special Term sustaining the demurrer to the com-

plaint of William E. Heim and dismissing his complaint.

The action was brought by a taxpayer to restrain the carrying out of an alleged threat of the Public Service Commissioners to declare all subway contracts void, and to withhold estimates thereunder, because the contractors have violated section 14 of chapter 36 of the Laws of 1909 as amended, known as the Labor Law, by employing aliens in the performances of their contracts.

Plaintiffs-in-error Cranford Company and Flinn-O'Rourke Co., Inc., were not originally made parties, though their contracts were among those referred to in, and made a part of, the complaint, and it was there alleged that they had wilfully violated section 14 of the Labor Law.

In the complaint and affidavits upon which a temporary injunction was granted pending argument of the motion for an injunction *pendente lite*, it was alleged that the said subway work is of vast public importance and that the contracts by reason of the participation of the Interborough Rapid Transit Co. and the Brooklyn Rapid Transit Co. (or its subsidiaries) are of a private nature and exempt from the operations of said law; that both The City of New York and the contractors have consistently ignored section 14, and that, therefore, the equitable doctrines of estoppel and waiver intervened to prevent its enforcement; that said section is unconstitutional and void and its enforcement would result in a multiplicity of suits for damage to which the City would have no defense, and reletting would be slow and expensive, all resulting in irreparable damage to the City and to the plaintiff.

Upon the argument of the motion for injunction, Cranford Company and Flinn-O'Rourke Com-

pany, Inc., were upon their motion made parties defendant.

A demurrer to the complaint alleging that it did not state facts sufficient to constitute a cause of action was sustained at Special Term, and judgment was entered dismissing the complaint.

Said section 14 of the Labor Law (Laws 1909 of the State of New York, chap. 36, Consolidated Laws, chap. 31) reads as follows:

> "Section 14. Preference in employment of persons upon public works. In the construction of public works by the state or a municipality, or by persons contracting with the state or such municipality, only citizens of the United States shall be employed; and in all cases where laborers are employed on any such public works, preference shall be given citizens of the state of New York. In each contract for the construction of public works a provision shall be inserted, to the effect that, if the provisions of this section are not complied with, the contract shall be void. All boards, officers, agents or employees of cities of the first class of the state, having the power to enter into contracts which provide for the expenditures of public money on public works, shall file in the office of the commissioner of labor the names and addresses of all contractors holding contracts with said cities of the state. Upon letting of new contracts the names and addresses of such new contractors shall likewise be filed. Upon the demand of the commissioner of labor a contractor shall furnish a list of the names and addresses of all sub-contractors in his employ. Each contractor performing work for any city of the first class shall keep a list of his employees, in which it shall be set forth

whether they are naturalized or native born citizens of the United States, together with, in case of naturalization, the date of naturalization and the name of the court where such naturalization was granted. Such lists and records shall be open to the inspection of the commissioner of labor. A violation of this section shall constitute a misdemeanor and shall be punishable by a fine of not less than fifty dollars nor more than five hundred dollars or by imprisonment for not less than thirty nor more than ninety days, or by both such fine and imprisonment."

Upon appeal to the Appellate Division, our clients, neither assenting to nor denying the special allegations, doubtless urged by plaintiff's counsel as ground for an injunction *pendente lite*, urged the single ground that section 14 of the Labor Law is void because it is violative of the Constitution of the State of New York and of the Constitution of the United States and laws enacted in pursuance thereof and treaties made by the United States with sovereign nations.

After argument of said appeal the said Appellate Division unanimously reversed the judgment at Special Term, holding in substance that the act was unconstitutional and void, being in conflict with both the State and Federal Constitutions in that it deprived the excluded aliens of their liberty and property without due process of law, and denied to them the equal protection of the law. In view of its determination and the grounds thereof the said Appellate Division declined to consider the question raised on the appeal whether the said act was void because in contravention of treaties between the United States and foreign countries, and of subdivision 2 of Article VI. of the Federal Constitution.

The Appellate Division also intimated without deciding, that The City of New York, existing under ancient Charters, may have had private contractual rights which rendered it independent, in the construction of its subways, of dictation from the Legislature with respect to its employees. Inasmuch as this question will be argued by counsel for plaintiff-in-error Heim, we shall confine ourselves to arguments based upon the Constitution, treaties and laws of the United States.

The defendant Commissioners appealed to the Court of Appeals from the decision of the Appellate Division, and said Court reversed the Appellate Division and sustained the judgment at Special Term.

The plaintiffs-in-error petitioned this Court for a writ of error to review said judgment which writ was granted and the proceedings brought into this Court for consideration.

The plaintiffs-in-error Cranford Company and Flinn-O'Rourke Co., Inc., do not deny that in the performance of their contracts they were at the time of the institution of this action employing aliens upon contracts entered into by them with The City of New York, acting by and through the Public Service Commission for the First District, for the construction of portions of subways in The City of New York, a municipal corporation. They do not concede that said work was public work within the meaning of section 14 of the Labor Law of the State of New York, but they assert that, if such work is public work, nevertheless said law is void for the reasons hereinafter stated.

With the permission of this Court we shall hereinafter style our clients Cranford Company and Flinn-O'Rourke Co., Inc., "plaintiffs-in-error,"

leaving to the efficient counsel for plaintiff-in-error Heim the task of presenting the views of his client.

Specification of Errors Relied Upon.

Plaintiffs in error will rely upon and argue the following errors:

1. THE JUDGMENT WAS ERRONEOUS BECAUSE IT WAS BASED UPON A VIOLATION OF SECTION 14 OF CHAPTER 36 OF THE LAWS OF 1909 OF THE STATE OF NEW YORK, KNOWN AS THE LABOR LAW, WHICH LAW WAS VOID, BEING IN CONFLICT WITH SECTION 1 OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION WHICH PROVIDES THAT "NO STATE SHALL MAKE OR ENFORCE ANY LAW WHICH SHALL ABRIDGE THE PRIVILEGES OR IMMUNITIES OF CITIZENS OF THE UNITED STATES; NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY OR PROPERTY, WITHOUT DUE PROCESS OF LAW, NOR DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS."

SAID SECTION 14 OF THE LABOR LAW DID ABRIDGE THE PRIVILEGES AND IMMUNITIES OF PLAINTIFFS IN ERROR CITIZENS OF THE UNITED STATES AND OF THEIR ALIEN EMPLOYEES BY DEPRIVING THEM OF THEIR RIGHT TO CONTRACT FOR LABOR, AND THE STATE OF NEW YORK, BY ENACTING SAID LAW AND ENFORCING ITS PROVISIONS AGAINST PLAINTIFFS IN ERROR DEPRIVED THEM AND THEIR SAID EMPLOYEES OF LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW AND DENIED TO THEM THE EQUAL PROTECTION OF THE LAWS. THE COURT OF APPEALS OF THE STATE OF NEW YORK ERRED IN HOLDING TO THE CONTRARY.

2. THE JUDGMENT WAS ERRONEOUS BECAUSE IT WAS BASED UPON THE PROVISIONS OF SECTION 14 OF CHAPTER 36 OF THE LAWS OF 1909 OF THE STATE OF NEW YORK, KNOWN AS THE LABOR LAW, WHICH LAW WAS VOID, BEING IN CONFLICT WITH SUBDIVISION 2 OF

ARTICLE VI OF THE UNITED STATES CONSTITUTION WHICH PROVIDES THAT "THIS CONSTITUTION AND THE LAWS OF THE UNITED STATES, WHICH SHALL BE MADE IN PURSUANCE THEREOF, AND ALL TREATIES MADE, OR WHICH SHALL BE MADE, UNDER THE AUTHORITY OF THE UNITED STATES, SHALL BE THE SUPREME LAW OF THE LAND; AND THE JUDGES IN EVERY STATE SHALL BE BOUND THEREBY, ANYTHING IN THE CONSTITUTION OR LAWS OF ANY STATE TO THE CONTRARY NOTWITHSTANDING." PURSUANT TO SAID ARTICLE TREATIES HAD BEEN ENTERED INTO BY THE UNITED STATES WITH VARIOUS NATIONS INCLUDING ITALY, WHICH TREATIES WERE IN EFFECT AT THE TIME OF THE ACT COMPLAINED OF AND AT THE TIME OF HIS CONVICTION, AND WHICH PUT ALIENS WITHIN THE STATE OF NEW YORK UPON AN EQUALITY WITH CITIZENS OF THE STATE WITH RESPECT TO THE RIGHT TO LABOR UPON PUBLIC WORKS, AND CONGRESS HAD PURSUANT TO SAID SECTION DULY ENACTED A LAW (REVISED STATUTES, SEC. 1977) GRANTING TO ALL PERSONS WITHIN THE JURISDICTION OF THE UNITED STATES THE SAME RIGHT IN EVERY STATE AND TERRITORY TO MAKE AND ENFORCE CONTRACTS AS IS ENJOYED BY WHITE CITIZENS. SAID TREATIES AND SAID LAW NULLIFIED THE PROVISIONS OF SAID SECTION 14 OF THE LABOR LAW, AND THE COURT OF APPEALS, OF THE STATE OF NEW YORK, ERRED IN HOLDING TO THE CONTRARY.

Upon the facts shown by the transcript of the record, hereinbefore epitomized, and upon the foregoing assignments of error plaintiffs in error make the following points:

POINT I.

The Fourteenth Amendment of the United States Constitution, either ex proprio vigore, or by virtue of treaties entered into, and laws of Congress enacted, pursuant to the provisions of Article VI. of the Constitution, has granted to resident aliens in the State of New York an equal right with citizens of that State to contract to labor upon the public works of the State, and chapter 14 of the Labor Law of the State, being in contravention of that right, was and is unconstitutional and void, and the judgment dismissing the complaint was error, and should be set aside.

We deem it unnecessary to discuss separately the force and effect of the Fourteenth Amendment apart from that of treaties entered into, and laws enacted, pursuant to Article VI of the Constitution. For it is apparent that if the law in question is repugnant to the rights granted by either it is void; also that while said Fourteenth Amendment may not ex proprio vigore be in conflict with said Labor Law, yet if, by the provisions of treaties entered into or laws enacted pursuant to Article VI of the constitution the equal rights granted by the Fourteenth Amendment are extended to aliens, the same result is effected.

We will be aided in understanding the problem before us if we consider what was actually decided by the Court of Appeals of the State of New York.

The majority of the learned Judges of the Court of Appeals, in sustaining the constitutionality of the act in question, were, we believe, misled into drawing an unwarranted conclusion of law from certain well established, though unrelated, legal premises.

Their syllogia may be summarized as follows:

(*a*) The moneys of the State belong to the people of the State (opinion of Cardozo, p. 46). The People of the State constitute the state and its members are its citizens, and aliens are excluded from such membership (opinion Cardozo, p. 46).

(*b*) Every citizen has a like interest in the application of the public wealth to the common good, and although the Government in expending the citizens' money may not by arbitrary discrimination further the employment of one class of citizens to the discouragement of the employment of other classes of citizens, yet an alien has no such interest (opinion of Cardozo, p. 47).

(*c*) The power of a State to discriminate between citizens and aliens in the distribution of its own resources has been approved by the courts and long time custom. To better the condition of its citizens, and perhaps to prevent pauperism, the legislature has declared that the moneys of the State shall go to the people of the State (opinion of Cardozo. pp. 47-8).

(*d*) While the Government of the State concededly cannot deny to aliens the right to engage in private trades on equality with citizens, and cannot

in its public capacity pass laws regulating private business by barring aliens from the right to trade and labor (opinion of Cardozo, pp. 51-52), nevertheless the Government may in its capacity as a proprietor issue a mandate to its own agents and thereby bar aliens from the right to labor on works prosecuted by it in its private capacity (opinion of Cardozo, p. 52).

(*e*) The Courts have declared that the State in the prosecution of a public work stands in just the same position as an individual, and may in such capacity prescribe the conditions on which it will contract for such work, and make a violation of his contract by the contractor a criminal offense (opinion of Bartlett pp. 54-5). It is not a right of citizenship to be employed upon public works, and the State may discriminate as between its own citizens, and therefore may discriminate as against aliens (opinion of Seabury, p. 57).

(*f*) The power of control of public works by the State is an exercise of the Police Power, and as owner and proprietor the State may say who may labor upon its public works (opinion of Seabury, pp. 59-61).

(*g*) The law in question does not violate any treaties, because the treaties cannot control the State in the exercise of its proprietary right over its own works (Opinion of Cardozo, p. 52; opinion of Seabury, pp. 61-62).

Each of the foregoing propositions contains its modicum of truth. But under the Federal Constitution the assigned conclusion does not follow from the established premises, as we trust we shall be able to show.

While the people of the State constitute the State and its members are its citizens (*Penhallow*

vs. *Doanes' Adms.*, 3 Dallas, 54, 93; *Texas* vs. *White*, 7 Wall., 700; *United States* vs. *Cruikshank*, 92 U. S., 542) and while aliens are not constituents of such membership, the control of the State over the property of its citizens is by no means absolute.

The power of taxation, which has been held to be the very essence of the governing power, is not unlimited. Mr. Justice Miller defined this limitation in *The Citizens Savings and Loan Ass'n* vs. *Topeka*, 87 U. S., 655, a case coming to this Court from Kansas wherein was brought in question the validity of a law authorizing municipal aid to private corporations:

> "If these municipal corporations, which are in fact subdivisions of the State, and which for many reasons are vested with quasi legislative powers, have a fund or other property out of which they can pay the debts which they contract, without resort to taxation, it may be within the power of the Legislature of the State to authorize them to use it in aid of projects strictly private or personal, but which would in a secondary manner contribute to the public good; or where there is property or money vested in a corporation of this kind for a particular use, as public worship or charity, the Legislature may pass laws authorizing them to make contracts in reference to this property and incur debts payable from that source."

The learned Justice went on to discuss the decisions in various States relative to the power of the Legislature to authorize the sale of bonds to aid railroads, and continued:

> "We have referred to this history of the contest over aid to railroads by taxation, to show that the strongest advocates for the validity of

these laws never placed it on the ground of the unlimited power in the State Legislature to tax the people, but conceded that where the purpose for which the tax was to be issued could no longer be justly claimed to have this public character, but was purely in aid of private or personal objects, the law authorizing it was beyond the legislative power and was an unauthorized invasion of private rights. * * * It must be conceded that there are such rights in every free government beyond the control of the State. * * * The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. * * * There are limitations on such powers which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. * * * To lay, with one hand, the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms."

The power of the State over the public property is no more absolute. A present legislative body cannot abdicate its authority, nor foreclose a succeeding Legislature from action in the same matter, nor can the State permanently relinquish the trust vested in it to control and manage the public property.

"The trust devolving upon the State for the public, and which can only be discharged by

> the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining" (*Illinois* vs. *Ill. C. R. R. Co.*, 146 U. S., 386)

Nor can the State recall powers vested in a municipality in such a way as to impair the obligation of contracts. While

> "a municipal corporation is, so far as its purely municipal relations are concerned, simply an agency of the state for conducting the affairs of government, and as such it is subject to the control of the legislature" (*Williams* vs. *Eggleston*, 170 U. S., 303),

the dual character of a municipality, the one sovereign and the other private or corporate is well established.

> *Dillon on Mun. Corps.* (5th Ed.), Vol. 1, Secs. 108-111, 113-116, 118-120, 132.

In *People* ex rel. *Le Roy* vs. *Hurlburt*, 24 *Mich.*, 44, Judge Cooley says (pages 103, 108):

> "Conceding to the state the authority to shape the municipal organizations at its will, it would not follow that a similar power of control might be exercised by the state as regards the property which the corporation has acquired, or the rights in the nature of property which have been conferred upon it. * * * The municipality, as an agent of government,

> is one thing; the corporation, as an owner of property, is in some particulars to be regarded in a very different light. The Supreme Court of the United States held at an early day that grants of property to public corporations could not be resumed by the sovereignty (Terrett *vs.* Taylor, 9 Cranch, 43; Town of Pawlet *vs.* Clark, *ibid* 292; and see Dartmouth College *vs.* Woodward, 4 Wheat, 694-698. * * * In Detroit *vs.* Corey, 9 Mich., 195, Manning, *J.*, bases his opinion that the city was liable for an injury to an individual, occasioned by falling into an excavation for a sewer, carelessly left open, upon the fact that the sewers were the private property of the city, in which the outside public or people of the state at large had no concern. * * * Other cases might be cited. * * * They rest upon the well understood fact that these corporations are of a two-fold character; the one public as regards the state at large, in so far as they are its agents in government; the other private, in so far as they are to provide the local necessities and conveniences for their own citizens; * * * The State may mould local institutions according to its views of policy or expediency; but local government is matter of absolute right; and the state cannot take it away. * * *"

The same doctrine was stated in *State of Wisconsin* vs. *Haben*, 22 Wisc., 660; repeated by Judge Allen in *Proprietors of Mount Hope Cemetery* vs. *Boston*, 158 Mass., 509; and emphasized in *Webb* vs. *The Mayor*, 64 *Howards Practice* (N. Y.), 10.

There is, also, over and above express checks, the vague, but nevertheless substantial and formidable, check to legislation which Justice Miller styled, in

the excerpt from the case of *Savings Bank* vs. *Topeka,* from which we have already quoted,

> "limitations * * * which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist * * *."

And finally the States have voluntarily, deliberately, and irrevocably given up for the common national advantage certain attributes of sovereignty, and have vested in the national legislative body and its executive certain powers of action which preclude the exercise of similar powers in the States, and at the same time have solemnly covenanted that any state action conflicting with such ceded powers shall be null and void (*Penhallow* vs. *Doane's* Admx., 3 Dallas, 54; Texas *vs. White,* 7 Wall, 720; *United States* vs. *Cruikshank,* 92 U. S., 542; *Choc Chan Ping* vs. *United States,* 130 U. S., 581; *Gibbons* vs. *Ogden,* 9 Wheat, 1; *Cohens* vs. *Virginia,* 6 Wheat, 264).

In *United States* vs. *Cruikshank* (supra), the court says:

> "We have in our political system a government of the United States and a government of each of these several states. Each one of these governments is distinct from the others, and each has citizens of its own who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States, and a citizen of a state, but his rights of citizenship under one of those governments will be different from those he has under the other (Slaughter House Cases, 16 Wall, 74)."

Then speaking of the general government, the court says:

> "The government thus established and defined is to some extent a government of the states in their political capacity. It is, also, for certain purposes, a government of the people. Its powers are limited in number, but not in degree. Within the scope of its powers, as enumerated and defined, it is supreme and above the states * * *.
>
> "The people of the United States resident within any state are subject to two governments, one State and the other National, but there need be no conflict between the two. The powers which one possesses, the other does not. They are established for different purposes, and have separate jurisdictions."

In Cohens *vs.* Virginia (*supra*), Chief Justice Marshall said (page 414):

> "In many other respects, the American people are one; and the Government which is alone capable of controlling and managing their interests in all these respects, is the government of the Union. It is their government, and in that character they have no other. America has chosen to be, in many respects and to many purposes, a nation; and for all these purposes her government is complete; to all these objects, it is competent. The people have declared that in the exercise of all powers given for these objects it is supreme. It can, then, in effecting these objects, legitimately control all individuals or governments within the American territory. The Constitution and laws of a state, so far as they are repugnant to the Constitution and laws of the United States, are absolutely void. These states are constituent parts

> of the United States. They are members of one great empire—for some purposes sovereign, for some purposes subordinate."

With such a system of checks and balances it is not surprising that those who have fondly believed that law is an exact science have been confounded and confused by the innumerable, and in many cases apparently irreconcilably conflicting, decisions of our courts with respect to the constitutional limitations of the sovereign powers of the State.

Thus of the police power of the states, which Chief Justice Taney, in *License Cases*, 5 Howard, 504, declared to be (page 583)

> "nothing more or less than the powers of government inherent in every sovereignty,"

a Justice of this court said in *Noble State Bank* vs. *Haskell*, 219 U. S., 104:

> "With regard to the police power, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the opposing sides."

This same rule was somewhat more elaborately stated in *Hudson County Water Co.* vs. *McCarter*, 209 U. S., 349:

> "All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the state. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but

points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side. For instance, the police power may limit the height of buildings in a city, without compensation. To that extent it cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of property would prevail over the other public interest, and the police power would fail. To set such a limit would need compensation and the power of eminent domain."

* * * * * * * *

"It constantly is necessary to reconcile and to adjust different constitutional principles, each of which would be entitled to possession of the disputed ground but for the presence of others, as we already have said that it is necessary to reconcile and to adjust different principles of the common law. See Asbell *vs.* Kansas (209 U. S. 251, ante, 778, 28 Sup. Ct. Rep. 485)."

By such process of delineation coupled with abstract reasoning, and aided, but not controlled, by prior decisions, we believe the correct solution of the issue here involved will be found.

(*a*) Authority for this Law Does Not Lie in the Police Power.

We respectfully suggest that the learned Judges of the Court of Appeals by no means fortified their decision by attempting to find in the police power the authority of the legislature to enact the statute in question.

For the police power of the state, like all other state powers, has its limits. While its depths may never have been plumbed, its boundaries have been well defined. It is bounded on one side by the United States Constitution, and on the other by the necessity of establishing that its exercise is required for the preservation of the health, morals or good order of the community.

Judge Cardozo in his opinion in this case, refers to the decision of Justice Brewer in *State* vs *Osawkee,* 14 Kan. 419, in support of his suggestion. (we can call it no more) that the discrimination of the statute against aliens is justified by the possibility that thereby it may prevent pauperism among the citizens of the State. We doubt whether a careful reading of the very learned and persuasive opinion in that case will justify that conclusion. The act in question authorized towns to issue bonds to raise money to loan to farmers to purchase grain for seed and for feed. The Court, by Justice Brewer, said (pages 423-5, 427):

> "The purpose of the act * * * is to provide the destitute with provisions, and with grain for seed and feed * * *. Its aim is not to furnish food to the hungry, clothing to the naked, or fuel to those suffering from cold. It is not the helpless and dependent whose wants are alone sought to be relieved. * * * It taxes the whole community to assist one class, and that, not for the purpose of relieving actual want, but to assist them in their regular occupations. These people are engaged in the business of farming. * * * They are destitute of seed, and their stock require grain. Hence the tax upon the community. * * * Were the carpenters or shoemakers, or any other industrial class, located in a separate quarter of a city, and their tools and stock in

> trade swept away by fire, could a tax be sustained to purchase new sets of tools, and new stock in trade * * *? * * * But it may be said that this legislation can be defended as *preventive and anticipatory.* * * * Grant that these parties are not now helpless and dependent; that they are not a public charge Unless they are able to make and harvest a crop they may become so the ensuing winter. Is it not the part of wisdom to expend a little now to purchase seed and feed, rather than run the risk of having them become paupers hereafter? * * * Let the doorways of taxation be opened, not merely to the relief of present and actual distress, but in anticipation of and to guard against future want, and who can declare the result? How certain must be the expectation of want? How nigh its approach? * * * Must widespread and general calamity precede the granting of such anticipatory relief, or is it enough that individual misfortune or indolence render probable the approach of want? The mere mention of these questions suggests the dangers which would follow the adoption of this as a rule of public conduct."

This decision, which was in point of time nearly contemporaneous with the decision of this court in *Citizens Savings Ass'n* vs. *Topeka,* hereinabove cited, declares the same principle, and is, we submit, based upon reason and authority.

In *Henderson* et al vs. *Wickham,* 92 U. S. 259, it was said:

> "* * * assuming that, in the formation of our government, certain powers necessary to the administration of their internal affairs are reserved to the states, and that among these

powers are those for the preservation of good order, of the health and comfort of the citizens, and their protection against pauperism and against contagious and infectious diseases, and other matters of legislation of like character, they insist that the power here exercised falls within this class, and belong rightfully to the states.

"This power, frequently referred to in the decisions of this court, has been, in general terms, somewhat loosely called the police power. It is not necessary for the course of this discussion to attempt to define it more accurately than it has been defined already. It is not necessary, because whatever may be the nature and extent of that power, where not otherwise restricted, no definition of it and no urgency for its use can authorize a state to exercise it in regard to a subject matter which has been confided exclusively to the discretion of Congress by the Constitution.

"Nothing is gained in the argument by calling it the police power. Very many statutes, when the authority on which their enactments rest is examined, may be referred to different sources of power, and supported equally well under any of them. A statute may, at the same time, be an exercise of the taxing power and of the power of eminent domain. A statute punishing counterfeiting may be for the protection of the private citizen against fraud, and a measure for the protection of the currency and for the safety of the government which issues it. It must occur very often, that the shading which marks the line between one class of legislation and another is very nice, and not easily distinguishable.

> "But, however difficult this may be, it is clear from the nature of our complex form of government, that, whenever the statute of a state invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied to powers conceded to belong to the states."

In *New Orleans Gas Light Co.* vs. *Louisiana Light etc Co.*, 115 U. S. 650, this Court said:

> "That there is a power, sometimes called the police power, which has never been surrendered by the States, in virtue of which they may, within certain limits, control everything within their respectives territories, and upon the proper exercise of which, under some circumstances, may depend the public health, the public morals or the public safety, is conceded in all cases. Gibbons *vs.* Ogden, 9 Wheat. 203 (22 U. S. bk. 6, L. ed. 71). In its broadest sense, sometimes defined, it includes all legislation and almost every function of civil government. Barbier *vs.* Connolly, 113 U. S. 31 (Bk 28, L. ed. 924). As thus defined, we may, not improperly, refer to that power the authority of the state to create educational and charitable institutions, and provide for the establishment, maintenance and control of public highways, turnpike roads, canals, wharves, ferries and telegraph lines, and the draining of swamps. Definitions of the police power must, however, be taken subject to the condition that the state can not in its exercise, for any purpose whatever, encroach upon the powers of the General Government, or rights granted or secured by the supreme law of the land.

"Illustrations of interference with the rightful authority of the General Government by the state legislation—which was defended upon the ground that it was enacted under the police power—are found in cases where enactments concerning the introduction of foreign paupers, convict and diseased persons, were held to be unconstitutional, as conflicting, by their necessary operation and effect, with the paramount authority of Congress to regulate commerce with foreign nations, and among the several States. In Henderson etc. *vs.* Mayor of New York, 92 U. S. 263 (Bk. 23, L. ed. 543), the court, speaking by Mr. Justice Miller, while declining to decide whether in the absence of action by Congress the States can, or how far they may, by appropriate legislation protect themselves against actual paupers, vagrants, criminals and diseased persons, arriving from foreign countries, said that no definition of the police power, and 'no urgency for its use can authorize a state to exercise it in regard to a subject matter which has been confided exclusively to the discretion of Congress by the Constitution.' Chy Lung *vs.* Freeman, 92 U. S. 276 (Bk. 23 L. ed. 550). And in the Railroad Company *vs.* Husen, 95 U. S. 474 (Bk. 24, L. ed. 531), Mr. Justice Strong, delivering the opinion of the court, said that 'the police power of a state can not obstruct foreign commerce or interstate commerce beyond the necessity for its exercise; and under color of it, objects not within its scope, can not be secured at the expense of the protection afforded by the Federal Constitution.'

"That the police power, according to its largest definition, is restricted in its exercise by the National Constitution, is further shown by those cases in which grants of exclusive

> privileges respecting public highways and bridges over navigable streams have been sustained as contracts, the obligations of which are fully protected against impairment by state enactments." * * *

In *Holden* vs. *Hardy*, 169 U. S. 366, the police power was carefully defined:

> "This right of contract, however, is itself subject to certain limitations which the state may lawfully impose in the exercise of its police powers. While this power is inherent in all governments, it has doubtless been greatly expanded in its application during the past century, owing to an enormous increase in the number of occupations which are dangerous, or so far detrimental to the health of employees as to demand special precaution for their well being and protection, or the safety of adjacent property. While this court has held notably in the cases of Davidson *vs.* New Orleans, 96 U. S. 97 (24:616), and Yick Wo. *vs.* Hopkins, 118 U. S. 356 (30:220), that the police power can not be put forward as an excuse for oppressive and unjust legislation, it may be lawfully resorted to for the purpose of preserving the public health, safety, or morals, or the abatement of public nuisances, and a large discretion 'is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests.' Lawton *vs.* Steele, 152 U. S. 133, 136 (38:385, 388)."

In *Jacobson* vs. *Mass.* 197 U. S. 11, compulsory vaccination was under consideration. The court said:

> "The authority of the state to enact this statute is to be referred to what is commonly

called the police power—a power which the state did not surrender when becoming a member of the Union under the Constitution. Although this court has refrained from any attempt to define the limits of that power, yet it has distinctly recognized the authority of a state to enact quarantine laws and "health laws of every description," indeed all laws that relate to matters completely within its territory, and which do not by their necessary operation affect the people of other states. According to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the pubile health and the public safety."

* * * * * * *

"A local enactment or regulation, even *if based on the acknowledged police powers* of a state, must always yield in case of conflict with the exercise by the general government of any power it possesses under the Constitution, or with any right which that instrument gives or secures (Gibbons *vs.* Ogden, 9 Wheat, 1, 210; Sinnot *vs.* Davenport, 22 How., 227, 243; Missouri K. & T. R. Co. *vs.* Haber, 169 U S., 613, 626)."

* * * * * * *

"In *Crowley* vs. *Christensen*, 137 U. S., 86, 89, we said: 'The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom

> from restraint under conditions essential to the equal enjoyment of the same right by others. It is, then, liberty regulated by law.'
>
> * * * * * * *
>
> "'Before closing this opinion, we deem it appropriate, in order to prevent misapprehension as to our views, to observe—perhaps to repeat a thought already sufficiently expressed, namely—that the police power of a state, whether exercised directly by the legislature or by a local body acting under its authority, may be exerted in such circumstances or by regulations so arbitrary and oppressive in particular cases, as to justify the interference of the courts to prevent wrong and oppression.'"

In *Lochner, vs. New York*, 198 U. S., 45, in considering a statute regulating hours of labor in bakeries, this court defined the police power as follows:

> "Those powers, broadly stated, and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public."

It appears from the foregoing that the police power is not in itself a sufficient answer to the challenge of the legality of Section 14 of the Labor Law. Indeed, Judge Cardozo, in his opinion, seemed to apprehend that fact, for he said:

> "To disqualify citizens from employment on the public works is not only discrimination, but arbitrary discrimination" (page 47).

He bases his argument, therefore, not on the police power, but on the distinction between citizens and aliens, saying:

> "To disqualify aliens is discrimination indeed but not arbitrary discrimination, for the

principle of exclusion is the restriction of the resources of the state to the advancement and profit of the members of the state" (page 47).

He says again:

"In thus holding that the power exists to exclude aliens from employment on the public works, we do not, however, commit ourselves to the view that the power exists to make arbitrary distinctions between citizens. We do not hold that the government may create a privileged caste among the members of the state" (page 51).

On the other hand, Judge Seabury makes the broad assertion (page 60) that the state has

"the right to employ certain citizens to the exclusion of others and the citizens not so employed are not in any legal sense unlawfully discriminated against."

We think that this court will be surprised to see that this doctrine is attributed to the decision in *Atkin* vs. *Kansas*, 191 U. S., 207. If we have read that case correctly we are justified in asserting that this court did not therein intend to overturn its long-time decisions to the contrary; and contented itself with holding that the State, as a contractor, had the right to establish and enforce the *conditions* upon which *any* person could bid for, receive, and execute a contract for public works. We find in that decision no ruling, and no dictum, that the State may arbitrarily establish a preferred class of citizens who may exercise the privilege of contracting for, and working upon, public works.

The police power has been held to justify certain discriminations between citizens in limited and well defined instances where the public interest required it; requiring certain qualifications before

exercising a profession; limiting the manner, or time, of labor when the health or the safety of the community or of the laborer necessitated it; even limiting or prohibiting a specified business where it is concededly one not calculated to foster the public welfare; or controlling the manner of carrying on, or the profits of, a business which may be quasi public. Instances of such regulation are too common and well established to require citation.

But we challenge citations of a case where the State has been held justified in prohibiting to certain of its citizens any trade or calling which is in itself innocuous, and which is not such that the community has an interest in its performance.

Surely no justification could be sought or found for an attempted limitation by the State to a selected class of citizens of the right to labor in a ditch with a pick and shovel, even if the hole thereby created were intended by the State to contain either a sewer or the foundations of a court house.

We must look beyond the Police Power for the justification of this statute.

(*b*) The Distinction Between Citizens and Aliens is Insufficient to Justify the Act.

But it is said that no further justification is necessary except the fact that the included are citizens and the excluded are aliens.

In support of this proposition there are cited the undoubted authority of the State to limit the capture and use of wild game, and all natural resources, to citizens; the State's equally conceded right to refuse to license an alien to sell liquor; its historic right to refuse to permit aliens to own or inherit real estate (unless the right is granted by treaty); its more doubtful, but nevertheless estab-

lished, right in some jurisdictions to make "alienage" synonymous with "suspicious," justifying discrimination in the granting of licenses to peddle.

The first named is founded upon the common ownership by all citizens (*Commonwealth* vs. *Hilton*, 174 Mass., 29; *McCready* vs. *Virginia*, 94 U. S., 391; *People* vs. *Lowndes*, 130 N. Y., 455; *Geer* vs. *Connecticut*, 161 U. S., 519; *Patsone* vs. *Pennsylvania*, 233 U. S., 138); the second is a mere corollary of the fact that the State may under the police power prohibit entirely the selling of liquor, or grant the privilege to whomever it chooses (*Bloomfield* vs. *State*, 86 Ohio St., 253; *Trageser* vs. *Gray*, 73 Md., 250; *Bartemeyer* vs. *Iowa*, 18 Wall, 129; *Crowley* vs. *Christensen*, 137 U. S., 86); the third is a survival of the common law (*Blythe* vs. *Hinckley*, 180 U. S., 333, *Freund on Police Powers*, Sec. 705); and the fourth is also based upon the police power as exercised to protect the morals of the community (*Commonwealth* vs. *Hana*, 195 Mass., 262). Equal authority, and it seems to us more cogent reasoning, denies this power (*State* vs. *Montgomery*, 94 Maine, 192), and for the purposes of the present discussion the decision in *Commonwealth* vs. *Hana* is of no aid to those who assert that alienage is in itself a sufficient ground for discrimination. In that case, the Court, in speaking of the Fourteenth Amendment, said:

> "It is decided that this provision applies to aliens as well as to citizens of the United States, and it is clear that a statute arbitrarily forbidding aliens to engage in ordinary kinds of business to earn their living would be unconstitutional and void. *Yick Wo* vs. *Hopkins*, 118 U. S., 356; *In re Ar Chong*, 2 Fed. Rep., 733; *In re Lee Sing*, 43 Fed. Rep., 359; *Pearson* vs. *Portland*, 69 Maine, 272."

This court in *Yick Wo* vs. *Hopkins*, 118 U. S., 356, which we shall have occasion to refer to more fully at a later point in this brief, effectually negatived the notion that alienage in itself may furnish a just excuse for the exercise of discrimination against following the ordinary occupations of life. The defenders of section 14 of the Labor Law of the State of New York must look further for its justification.

(c) Nor is Freedom to Contract Sufficient Justification for the Law.

But, they say, if there is no other reason, the fact that any person about to award a contract may employ whom he will, and exact such conditions as he wishes, not inconsistent with fundamental law, justifies the State as a contractor in doing the same thing. And they add that if as such contracting party the State desires to exclude aliens from participating in its contract work, it may make a violation of the contract agreement not to employ aliens a crime, and punish it as such.

If the question were open we would be glad to debate the latter proposition, and marshall the numerous cases in which it has been held that a breach of a contract cannot be made a crime, but we assume that the decisions of this court in *Atkin* vs. *Kansas*, 191 U. S., 207, and *Ellis* vs. *United States*, 206 U. S., 246, have settled that question. We concede, therefore, that if the State of New York had the power to prohibit the plaintiff in error from employing aliens in the performance of his contract, it had the power to make a violation of his covenant a crime, and to punish it as such.

Upon the first proposition, that the State as a contractor is on a par with any individual, and may by law exact any condition of the performance of its

contract which might be exacted by an individual, we most decidedly dissent.

In making such assertion its proponents lose sight of the fact that the state, though a contractor, is still a sovereign, and as such sovereign is bound by rules of procedure established by its constitution, by the constitution and laws of the United States, and by the fundamental rules and limitations to which we have already adverted, which constrain it to limit its caprice and check its whims in consonance with fundamental principles of justice and equity.

Common illustrations are easily cited. The State of New York may not loan its credit to or in aid of any individual association or corporation (*Constitution, Article* 7, *Section* 1). An individual may do so. The State may not create a debt except by vote of the people (*Constitution, Article* 7, *Section* 4). The individual is not thus limited. The Legislature is prohibited from giving any extra compensation to a contractor with the State (*Constitution, Article* 3, *Section* 28). But an individual may do so. Municipal corporations by their charters are required to award contracts of any material amount only after competitive bidding, and to the lowest bidder. An individual may contract when and with whom he will. Doubtless an individual might elect to employ only red headed men, but should the State impose the same obligation by law upon its subordinates we cannot suppose that such law would be sustained, because other citizens would justly claim that it was an arbitrarily unjust discrimination not based upon any good reason.

The right of an individual to contract is bounded only by the limitation that he shall not interfere with the rights of others, and shall not contract to do or have done, anything inimical to the morals, peace or good order of the community.

Congress cannot impose upon individuals any material limitations upon their life, liberty or property, including the right to contract (*Adair* vs. *United States*, 208 U. S., 161), but it has frequently been sustained in the exercise of its right to prohibit the State from enacting laws which trespassed upon rights vested in the National Government.

It may be conceded that the Superintendent of Public Works of the State of New York, *unrestrained by law*, may employ whom he will to drive the automobile used by him on State business, and in the exercise of that right may register his liking for red headed men, or his objection to alien employees. But this right does not advance a single step the argument that because he may do so, he may be authorized by law, or compelled by law, to employ a red headed man, or to refuse to employ an alien, as his chauffeur.

It may be conceded that the State may in its contractual capacity do the same in the matter of those employed by it upon its barge canal, but that concession does not carry with it the right to *enact a law requiring* such discrimination.

The reason for this is plain. New York State when it became a member of the United States of America solemnly covenanted with all other states that certain powers and authority were vested by them jointly in the Government of the United States; that in the exercise of those powers, and of that authority, the national goverment should be supreme; that it would not enact any laws (constitutional or legislative) which would tend to limit such ceded rights and authority; and that if it did do so such laws should be void.

In the last analysis, therefore, this court must determine whether Section 14 of the Labor Law of the State of New York is violative of any power

vested in, or duly exercised by, the National Government, or of any law passed by Congress pursuant to the Constitution of the United States.

(*d*) SECTION 14 OF THE LABOR LAW VIOLATES THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES, REINFORCED AS IT IS BY SECTION 1977 OF THE REVISED STATUTES.

In considering this and succeeding questions arising under the Constitution we must bear in mind that one of the first things that this Court decided was that the Constitution is not a document of limited authority and it is not to be strictly construed.

In *Gibbons* vs. *Ogden*, 9 Wheat., 1, Chief Justice Marshall said:

> "As preliminary to the very able discussions of the Constitution, which we have heard from the bar, and as having some influence on its construction, reference has been made to the political situation of these States anterior to its formation. It has been said that they were sovereign, were completely independent, and were connected with each other only by a league. This is true. But when these allied sovereigns converted their league into a government, when they converted their Congress of Ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a legislature, empowered to enact laws on the most interesting subjects, the whole character in which the States appear, underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected.

"This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said that these powers ought to be construed strictly. But why ought they be so construed? Is there one sentence in the Constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants, expressly the means of carrying all others into execution, Congress is authorized 'to make all laws which shall be necessary and proper' for the purpose. But this limitation on the means which may be used, is not extended to the powers which are conferred; nor is there one sentence in the Constitution which has been pointed out by the gentlemen of the bar, or which we have been able to discern, that prescribes this rule. We do not, therefore, think ourselves justified in adopting it. What do the gentlemen mean by strict construction? If they contend only against that enlarged construction which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the Constitution, would deny to the government those powers which the words of grant, as usually understood, import, and which are consistent with the general views and objects of the instrument; for that narrow construction, which would cripple the government and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood render it competent; then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the Constitution is to be expounded. As men, whose inten-

tions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said. If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. We know of no reason for excluding this rule from the present case. The grant does not convey power which might be beneficial to the grantor, if retained by himself, or which can inure solely to the benefit of the grantee, but is an investment of power for the general advantage, in the hands of agents selected for that purpose; which power can never be exercised by the people themselves, or lie dormant. We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred.

Among the "unlimited" powers conferred upon the Nation, are those vested in Congress by *Article* 1, *Section* 8, *Subdivisions* 3, 4 *and* 18:

"3. To regulate commerce with foreign nations, and among the several states * * *.

"4. To establish an uniform rule of naturalization; * * *.

"18. To make all laws which shall be necessary and proper for carrying into execution

> the foregoing powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

Among the other powers is that vested in the President

> "by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur" (*Art. II., sec.* 2, *subd.* 2).

And these powers are emphasized by *Subdivision* 2 *of Article VI.*, providing that

> "This constitution, and the laws of the United States, which shall be made in pursuance thereof; *and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land;* and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

Pursuant to said authority Congress has enacted laws which minutely regulate and provide for immigration and naturalization. Respecting naturalization, Congress has provided that an alien must *continuously* reside in this country *at least five years* before he shall become a citizen, and *at least one year* in the district within which he takes out his papers (*R. S., Sec.* 4351 *et seq.*).

Subject to the requirement of a declaration of intention two years before the issuance of papers, no adult alien of good moral character who can read and write the English language can be prevented by any State from acquiring the same status under the law of the State as that of its proudest citizen whose remote ancestor may have had the

good fortune to have chosen the Mayflower as his vehicle of immigration.

By the exclusive, and during the entire history of our country, unchallenged, mandate of Congress an alien may become a citizen of the United States, and by local domicile a citizen of any State, by merely declaring his intention after proper residence in this country and by taking an oath of allegiance, not to the State of his residence, but to the United States of America.

In passing we note that it may be a matter of inquiry why we have referred to the provision of the Constitution authorizing Congress to regulate commerce. The reason is clear. An examination of the decisions respecting the power to regulate commerce furnishes abundant argument for a similar unrestricted authority in Congress to do all things necessary to make effective its determination with respect to naturalization and domicile of aliens. The authority given to Congress by the Constitution to regulate commerce is given in no broader terms than the authority to provide for naturalization, and this Court has held time and again that the right to regulate commerce is exclusive and all-embracing (*Gibbons* vs. *Ogden*, 9 Wheat, 1; *Henderson et al.* vs. *Wickham*, 92 U. S., 259). Under this authority every act of a State Legislature, and even of private corporations and of individuals, designed to result in a regulation of commerce has been promptly nullified by this Court.

If, therefore, Congress has been vested with the power to determine upon what terms an alien may become a citizen, it must also be true that Congress has at its disposal the power to provide for all means necessary to effect its declared purpose.

It follows that if Congress may require continuous residence in this Country, and in a State, before an alien may become naturalized, it must have power to provide for the right of the alien to subsist while the probationary period is elapsing.

During such residence the alien is subject to taxation as is a citizen. All laws of the State and Nation bear upon him equally with citizens. It is only with regard to the power to contract that any question has ever arisen.

Congress therefore enacted a law which insured that right (*Sec.* 1977 *of the Revised Statutes*):

> "*All persons* within the jurisdiction of the United States shall have *the same right* in every state and territory to *make and enforce contracts* * * * and to the full and *equal* benefit of all laws and proceedings for the security of persons and property *as is enjoyed* by white *citizens*, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, *and to no other*."

Means of enforcing these rights are granted by Section 1979. This law obviously does not give to citizens of the United States alone the right to "make and enforce contracts" because the right thereby given is the right which any white "*citizen*" enjoys in the respective States. This right is expressly given not to citizens, but to "*all persons* within the jurisdiction of the United States."

That the origin of this law is to be found in a statute passed after the enactment of the Twelfth Amendment to aid in its enforcement, and that it was originally intended to protect colored citizens in their newly acquired rights (*U. S.* vs. *Rhodes*, 1 Abb. (U. S.), 28, 27 Fed. Cases, p. 785; *Livestock Dealers, etc., Assn. vs. Crescent City Livestock Land-*

ing, etc., Co., 1 Abb. (U. S.), 388, 15 Fed. Cases, p. 649; *Slaughter House Cases*, 16 Wall., 36; *Civil Rights Cases*, 109 U. S., 3; *U. S. vs. Jackson*, 3 Sawy. (U. S), 59, 26 Fed. Cases, p. 563), does not militate against the inclusiveness of the protection guaranteed thereby. The so-called Civil Rights Act was *re-enacted* after the adoption of the Fourteenth Amendment, which also was primarily designed to protect colored citizens in their political rights, and which has, nevertheless, been held to embrace all rights of all classes and conditions of people.

The right to enact this law follows as naturally and necessarily from the right of Congress to declare the terms upon which an alien may enter and live in the United States and become a citizen of the United States as it does from the right of Congress to enforce the 12th, 13th or the 14th Amendment. To declare that an alien must live within the Nation for five years and within a State for one year before becoming a citizen, and then to be unable to insure him the ability to earn his living and to subsist during that period, is so illogical as to carry its own refutation. In *Lem Moon Sing* vs. *U. S.*, 158 U. S., 538, this Court, in discussing the subject, said:

> "The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country * * * is settled by our previous adjudications * * *. His "(the alien's)" personal rights when he is in this country and such of his property as is here during his absence, are as fully protected by the supreme law of the land as if he were a native or a naturalized citizen of the United States * * *."

In *Yick Wo* vs. *Hopkins*, 118 U. S., 356, this Court recognized the force and effect of Section 1977:

> "The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality, and the equal protection of the laws is a pledge of the protection *of equal laws*. It is accordingly enacted by Section 1977 of the Revised Statutes, that 'all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses and exactions of every kind, and to no other.' The questions we have to consider and decide in these cases, therefore, are to be treated as involving the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court."

Thus did this Court hold that the Fourteenth Amendment applied to aliens equally with citizens, extending its benign protection to all alike whether citizens or aliens.

Freund on Police Powers, Sections 705-706, says:

> 705. * * * "The States are bound in their treatment of aliens partly by the inter-

national obligations of the United States, partly by the provisions of the Federal Constitution. A State cannot exclude aliens from its territory for political or economical reasons, * * *. Nor is it, generally speaking, competent for the States to deprive resident aliens of any privileges accorded to foreigners by the comity of nations or to discriminate against them where equal treatment is guaranteed by treaty." (Citing Yick Wo *vs.* Hopkins, 118 U. S. 356, Re Lee Sing, 43 Fed. Rep. 359.)

706. * * * "it is also clear that the right to take up any other common occupation cannot be barred by the States to resident aliens. For otherwise a State might close all profitable avocations to them, and, by preventing them from earning a livelihood, drive them away. Such a result would bring about international complications and can therefore be only a matter of national action. The federal adjudications in the matter of discrimination against Chinese in the laundry business, while involving also treaty rights, seems to support this position." (Citing Yick Wo *vs.* Hopkins, 118 U. S. 356, Re Parrott, 1 Fed. Rep. 481.)

The *Yick We* case has been cited no less than sixty times in the United States courts. We can find space for the briefest reference to only a few of these citations.

In *Connolly* vs. *Union Sewer Pipe Co.*, 184 U. S., 539, the court held that in a trust law a discrimination in favor of agricultural products or live stock rendered the act repugnant to the fourteenth amendment. In this case Mr. Justice Harlan in delivering the opinion, refuted the assertion that the act might be justified under the Police Powers, saying:

"But as the Constitution of the United States is the supreme law of the land, anything in the Constitution or statutes of the states to the contrary notwithtsanding, a statute of a state, even when avowedly enacted in the exercise of its police powers, must yield to that law. * * * The state has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health, and the pubilc safety; *but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void.*"

Wong Wing vs. *U. S.*, 163 U. S., 228,

holding that the protection of the fifth and sixth amendments applied to alien residents and prohibited commitment to hard labor without presentment or indictment and conviction.

Ex parte Orozco, 201 Fed. Rep., 106,

holding that the fourth, fifth and sixth amendments "protected citizens and aliens alike."

Other cases holding that the right to labor and pursue any lawful vocation is not only property but the right to liberty covered by the fourteenth amendment; that the power of the state to legislate falls before the exercise of powers conferred upon the United States Government whether resting in Congress or the treaty making powers, are numerous:

Sinnot vs. *Davenport,* 63 U. S. (22 How.), 227,

where the court held that the exercise of the police power is thereby nullified.

In re Baldwin, 27 Fed. Rep., 187,

interpreting a statute of the United States punishing a conspiracy to deprive Chinese of privileges secured to them by treaties.

Mondou vs. *N. Y., N. H. & H. R. R. Co.*, 223 U. S., 1,

holding that the United States law is supreme in state court—constitutes the state policy, see page 58.

McCulloch vs. *Maryland*, 17 U. S. (4 Wheaton), 316, at p. 405.

Gandolfo vs. *Hartman*, 49 Fed. Rep., 181,

holding void a covenant in a deed not to convey or lease to a Chinaman.

Workman vs. *Mayor*, 179 U. S. 552,

reversing the decisions of the Court of Appeals of New York State that a municipality is exercising a governmental capacity in its fire department and is not liable for torts committed in pursuit of such function, and holding that at maritime law a municipality is liable for such a tort.

People vs. *King*, 110 N. Y., 418,

holding that the refusal to sell tickets to a negro for entrance to a skating rink was a deprivation of liberty.

People ex rel. *Tyroler* vs. *Warden*, 151 N. Y., 116,

holding unconstitutional an act limiting sale of passenger tickets.

In re Jacobs, 98 N. Y., 98,

holding unconstitutional an act prohibiting manufacture of cigars and preparation of tobacco in a tenement.

Butchers Union Co. vs. *Crescent City etc. Co.*, 111 U. S., 746

People vs. *Hawkins*, 157 N. Y., 1,

condemning a law requiring all convict goods to be so labelled.

People vs. *Marx*, 99 N. Y., 377,

condemning a law prohibiting the manufacture or sale of a substitute for butter or cheese.

Frorer vs. *The People*, 141 Ill., 171,

"the privilege of contracting parties is both a liberty and a property right."

McChesney vs. *The People*, 200 Ill., 146.

And

City of Chicago vs. *Hulbert*, 205 Ill., 346,

holding agreement in municipal contracts not to employ aliens is unconstitutional and void. These cases seem to in effect overrule the earlier case of People *vs.* Nelson, 133 Ill., 565.

It is apparent that the above reasoning is not in any way modified by the decision of this Court in *Atkin* vs. *Kansas*, and *Ellis* vs. *U. S.* (supra). In those cases this Court ruled that the State may establish restrictions in its contracts *which apply to all alike*, may require its contractors to pay to its employees, *whomever they be*, the rate of wages prevailing in the community, and may enjoin its contractors, under penalty of forfeiture and punishment as for a crime, from requiring or permitting their employees to work more than eight hours in any day. Such regulations apply to *citizen and alien contractors alike, to citizen and alien employees alike*, and are not therefore a violation either of the Fourteenth Amendment, or of Section 1977 of the Revised Statutes.

But where, as illustrated by Section 14 of the Labor Law of the State of New York, an arbitrary

line is drawn between the right of citizens and aliens to "make and enforce contracts" both the Fourteenth Amendment and Section 1977 are violated, and the law is void.

We submit that if aliens were accorded no other protection than as above set forth the statute in question must be declared null and void and the conviction of plaintiff in error must be reversed.

(*c*) Section 14 of the Labor Law Also Violates Treaties Duly Entered Into by the United States Government With Foreign Nations, and Section 1977 of the Revised Statutes.

But other and equally potent rights of aliens have been violated by said acts—rights granted by the Executive and Senate by treaty.

That the treaty making power is as absolute and inclusive as other powers granted by the Constitution to the general government, is established equally by reason and authority.

What we have said with respect to the necessity of authority in Congress to protect resident aliens before they may become citizens applies with equal force to the necessity that the treaty making power of our government shall have the unlimited and conclusive right to stipulate with foreign governments the kind and extent of the rights which its, and their, citizens shall exercise in the territory of the other.

And such reasoning has been repeatedly and cogently applied by this Court since the foundation of our government in cases where the extent of that power has been questioned. The text book

writers treat it as an established rule of law. In 38 *Cyc., p.* 966, we find the following

> "As expressed in the Constitution of the United States, the treaty making power is in terms unlimited, and subject only to these restraints which are found in that instrument against the action of the government or its departments and those arising from the nature of the government itself and of that of the States" (citing De Geofroy *vs.* Riggs, 133 U. S., 258).

In *Penhallow* vs. *Doane's Adms.*, 3 *Dallas*, 54, the Court said that Congress was the central authority during the Revolution:

> "The truth is, that the States individually were not known nor recognized as soverign by foreign nations, nor are they now" (1795); "the states collectively under Congress as the connecting point or head, were acknowledged by foreign powers as sovereign, particularly in that acceptation of the term which is applicable to all great national concerns, and in the exercise of which other sovereigns would be more immediately interested; such, for instance, as the right of war and peace, of making treaties, and sending and receiving ambassadors."

* * * * * *

After adverting to the fact that the people may act by representatives and the majority may bind all, the court illustrated the central power of Congress, saying (page 94):

> "These principles have long been familiar in regard to the exercise of a constitutional power as to treaties. These are deemed the treaties of the two nations, not of the persons

only, whose authority was actually employed in their formation."

In *Choe Chan Ping* vs. *U. S.*, 130 U. S., 581, the Court said:

"As said by this court in the case of The Exchange *vs.* McFadden, 11 U. S. (7 Cranch), 116, 136, speaking by Chief Justice Marshall:

"'The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restrictions, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories must be traced up to the consent of the nation itself. They can flow from no other legitimate source.'

"While under our Constitution and form of government, the great mass of local matters is controlled by local authorities, the United States in their relation to foreign countries and their subjects or citizens are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory. The powers to declare war, make treaties, * * *, and admit subjects of other nations to citizenship, are all sovereign powers, restricted in their exercise only by the Constitution itself and considerations of public policy and justice which control more or less, the conduct of all civilized nations."

The Court then quoted from the decision of Chief Justice Marshall in *Cohens* vs. *Virginia* (*supra*).

This doctrine was emphasized in *Edye* vs. *Robertson*, 112 U. S., 580:

> "A treaty is primarily a compact between independent nations. * * * But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. * * * A treaty then, is a law of the land as an Act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a Court of Justice, that Court resorts to the treaty for a rule of decision for the case before it, as it would to a statute."

In the argument of *Patsone* vs. *Pennsylvania* (*supra*), the Attorney-General of the State asserted that the treaty making powers of the Federal Government is not unlimited, citing as authority *De Geofroy* vs. *Riggs*, 133 U. S., 258. We submit that nothing in the text of the decision of that case warrants such conclusion:

> "It is a rule in construing treaties as well as laws, to give a sensible meaning to all their provisions if that be practicable. 'The interpretation, therefore,' says Vattel, 'which would render a treaty null and inefficient can not be admitted;' and again 'it ought to be interpreted in such a manner as that it may have its effect, and not prove vain and nugatory."

* * * * * * * *

"By the last clause of the article the government of France accords to the citizens of the United States the same rights within its territory in respect to real and personal property and to inheritance as are enjoyed there by its own citizens. There is no limitation as to the territory of France in which the right of inheritance is conceded. And it declares that this right is given in like manner as the right is given by the government of the United States to citizens of France. To insure reciprocity in the terms of the Treaty, it would be necesary to hold that by 'States of the Union' is meant all the political communities exercising legislative powers in the country, embracing not only those political communities which constitute the United States, but also those communities which constitute the political bodies known as Territories and the District of Columbia. It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended. And it has been held by this court that where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred. Hauenstein *vs.* Lynham, 100 U. S., 487 (25; 629). The stipulation that the government of France in like manner accords to the citizens of the United States the same

rights within its territory in respect to real and personal property in inheritance as are enjoyed there by its own citizens, indicates that that government considered that similar rights were extended to its citizens within the territory of the United States, whatever the designation given to their different political communities."

In *Hauenstein* vs. *Lynham*, 100 U. S. 487 referred to in the above decision this court was even more emphatic, saying:

"The efficacy of the treaty is declared and guaranteed by the Constitution of the United States. That instrument took effect on the 4th day of March, 1789. In 1796, but a few years later, this court said: 'If doubts could exist before the adoption of the present National Government they must be entirely removed by the 6th article of the Constitution, which provides that "all treaties made or which shall be made under the authority of the United States shall be *the supreme law of the land*, and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." There can be no limitation on the power of the people of the United States. By their authority the State Constitutions were made, and by their authority the Constitution of the United States was established; and they had the power to change or abolish the State Constitutions or to make them yield to the General Government and to treaties made by their authority. A treaty cannot be *the supreme law of the land*, that is, of all the United States, if any Act of a State Legislature can stand in its way. If the Constitution of a State, which is the fundamental law of the

State and paramount to its Legislature, must give way to a treaty and fall before it, can it be questioned whether the less power, an Act of the State Legislature must not be prostrate? It is the declared will of the people of the United States that every treaty made by the authority of the United States shall be superior to the Constitution and laws of any individual State, and their will alone is to decide. If a law of a State, contrary to a treaty, is not void but voidable only, by a repeal or nullification by a State Legislature, this certain consequence follows, that the will of a small part of the United States may control or defeat the will of the whole." Ware *vs.* Hilton, 3 Dall. 199.

* * * * * * * *

"It must always be borne in mind that the Constitution, laws and treaties of the United States are as much a part of the law of every state as its own local laws and constitution. This is a fundamental principle in our system of complex national polity. * * *"

In re Tiburcio Parrott, 1 Fed. Rep., 481, holding unconstitutional a law of California making it an offense to employ Chinese; also holding a similar provision in the Constitution of California void as in conflict with the Chinese treaty,

the court in two separate opinions exhaustively examined prior state and federal cases, and pointed out the unanimity of decisions that treaties and the rights granted thereunder are paramount to all state constitutions and laws. Judge Sawyer said in part:

"As to the point whether the provision in question is within the treaty-making power, I

have as little doubt as upon the point already discussed. Among all civilized nations, in modern times at least, the treaty-making power has been accustomed to determine the terms and conditions upon which the subjects of the parties to the treaty shall reside in the respective countries, and the treaty-making power is conferred by the constitution in unlimited terms. Besides, the authorities cited on the first point fully cover and determine this question. If the treaty-making power is authorized to determine what foreigners shall be permitted to come into and reside within the country, and who shall be excluded, it must have the power generally to determine and prescribe upon what terms and conditions such as are admitted shall be permitted to remain. If it has authority to stipulate that aliens residing in a state may acquire and hold property, and on their death transmit it to alien heirs who do not reside in the state, against the provisions of the laws of the state, otherwise valid—and so the authorities already cited hold—then it certainly must be competent for the treaty-making power to stipulate that aliens residing in a state in pursuance of the treaty may labor in order that they may live and acquire property that may be so held, enjoyed, and thus transmitted to alien heirs. The former must include the latter—the principal, the incidental power. See also Holden *vs.* Joy, 17 Wall., 242-3; U. S. *vs.* Whisky, 3 Otto, 196-8."

Judge Sawyer decided that such provisions were also violative of the fourteenth amendment, saying:

"Section 1977 of the Revised Statutes passed to give effect to this amendment, pro-

vides that 'all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.'

"It will be seen that in the latter clause the words are 'any person,' and not 'any citizen,' and prevents any state from depriving 'any person' of life, liberty or property without due process of law or from denying to 'any person within its jurisdiction the equal protection of the law.' In the particulars covered by these provisions it places the right of every person within the jurisdiction of the state, be he Christian or heathen, civilized or barbarous, Caucasian or Mongolian, upon the same secure footing and under the same protection as are the rights of citizens themselves under other provisions of the constitution; and, in consonance with these provisions, the statute enacts that 'all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, * * * and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.' Chinese residing in California, in pursuance of the treaty stipulations, are 'persons within the jurisdiction of the state,' and 'of the United States,' and therefore within the protection of these provisions. And contracts to labor, such as all others make, are contracts which they have a 'right

to make and enforce,' and the laws under which others' rights are protected are the laws to which they are entitled to the 'equal benefit,' as is enjoyed by white citizens."

"It would seem that no argument should be required to show that the Chinese do not enjoy the equal benefit of the laws with citizens, or 'the equal protection of the laws,' where the laws forbid their laboring or making and enforcing contracts to labor, in a very large field of labor which is open, without limit, let or hindrance, to all citizens, and all other foreigners, without regard to nation, race, or color. Yet in the face of these plain provisions of the national constitution and statutes, we find, both in the constitution and laws of a great state and member of this Union, just such prohibitory provisions and enactments discriminating against the Chinese. Argument and authority, therefore, seem still to be necessary, and fortunately we are not without either. From the citations already made, and from many more that might be made from Justices Field, Bradley, Swayne and other judges, it appears that to deprive a man of the right to select and follow any lawful occupation—that is, to labor, or contract to labor, if he so desires and can find employment—is to deprive him of both liberty and property, within the meaning of the fourteenth amendment and the act of congress."

Among the many cases cited in the Parrott case or cited in cases so cited are the following:

U. S. vs. *Rauscher,* 119 U. S., 407,

dealing with the power of extradition and holding it to be exclusively within federal, and not state,

jurisdiction, as exercised by the treaty making power.

Baker vs. *Portland*, 2 Fed. Cases, 472

Holding law prohibiting the employment of Chinese to be invalid as conflicting with the treaty with China, saying:

"This treaty, until it is abrogated or modified by the political department of the government, is the supreme law of the land, and the courts are bound to enforce it fully and fairly. An honorable man keeps his word under all circumstances, and an honorable nation abides by its treaty obligations, even to its own disadvantage.

"The state cannot legislate so as to interfere with the operation of this treaty or limit or deny the privileges or immunities guaranteed by it to the Chinese residents in this country. As was said by Mr. Justice Field in the 'queue ordinance case,' lately decided in the circuit court for the district of California (Ho Ah Kow *vs.* Nunan, Case No. 6546) to the national government, 'belong exclusively the treaty-making power and the power to regulate commerce with foreign nations, which includes intercourse as well as traffic. * * * That government alone can determine what aliens shall be permitted to land within the United States and upon what conditions they shall be permitted to remain.'

"It will be observed that the treaty recognizes the right of the Chinese to change their home and allegience and to visit this country and become permanent residents thereof, and as such residents it guarantees to them all the privileges and immunities that may be enjoyed here by the citizens or subjects of any nation.

Therefore, if the state can restrain and limit the Chinese in their labor and pursuits within its limits, it may do the same by the subjects of Great Britain, France, or Germany.

"True, this act does not undertake to exclude the Chinese from all kinds and fields of employment. But if the state, notwithstanding the treaty, may prevent the Chinese or the subjects of Great Britain from working upon street improvements and public works, it is not apparent why it may not prevent them from engaging in any kind of employment or working at any kind of labor.

"Nor can it be said with any show of reason or fairness that the treaty does not contemplate that the Chinese shall have the right to labor while in the United States. It impliedly recognizes their right to make this country their home, and expressly permits them to become permanent residents here; and this necessarily implies the right to live and to labor for a living. It is difficult to conceive a grosser case of keeping the word of promise to the ear and breaking it to the hope than to invite Chinese to become permanent residents of this country upon a direct pledge that they shall enjoy all the privileges here of the most favored nation, and then to deliberately prevent them from earning a living, and thus make the proffered right of residence a mere mockery and deceit. In Chapman *vs.* Toy Long (Case No. 2610), this court, in considering these provisions of this treaty, said: 'The right to reside in the country, with the same privileges as the subjects of Great Britain or France, implies the right to follow any lawful calling or pursuit which is open to the subjects of these powers.'

"Whether it is best that the Chinese or other peoples should be allowed to come to this country without limit and engage in its industrial pursuits without restraint is a serious question, but one which belongs solely to the national government. Upon it there has always been a difference of opinion, and probably will be for years to come.

"But so far as this court and the case before it is concerned, the treaty furnishes the law, and with that treaty no state or municipal corporation thereof can interfere. Admit the wedge of state interference ever so little, and there is nothing to prevent its being driven home and destroying the treaty and overriding the treaty-making power altogether."

By the foregoing cases, and many others which might be cited, it is firmly established that if rights are granted to aliens by treaties they cannot be destroyed or limited by any act of a state; and that among such rights are the right to labor at any chosen lawful occupation upon equal terms with citizens.

The treaties of the Government of the United States with foreign governments and their stipulations being supreme over, and binding upon, the States and their Legislatures if in conflict with any State legislation, it remains only to examine the several treaties mentioned in the record and to determine the force and effect of their stipulations upon Section 14 of the Labor Law of the State of New York.

It should be noted that the nationality of none of the aliens employed by plaintiffs in error is shown by the record. Portions of various treaties with various countries deemed pertinent are contained in the record (pp. 13-27) and reference is

made thereto. In the following quotations we shall, for the sake of brevity, skeletonize the excerpts.

The Treaty with Italy of 1871 was amended in 1913, and Article 1 of the latter treaty provides:

> "The citizens of each * * * shall receive * * * the most constant security and protection for their *persons* and *property*, and for their rights, including * * * civil responsibility for injuries or for death caused by negligence * * *; and shall enjoy in this respect the same *rights* and *privileges* as are * * * granted to nationals, provided that they submit themselves to the conditions imposed on the latter."

By Article 2 the "citizens" of each are authorized to

> "*carry on trade* * * * and generally to do anything incident to or necessary for *trade* upon the same terms as the *natives of the country* submitting themselves to the laws there established."

Because most aliens employed in subway work are subjects of Italy, let us first consider whether the treaty with Italy gave to its subjects equally with citizens the right to employment upon the public works of the State of New York.

It is perhaps unnecessary to repeat that we do not assert that the alien has a greater right than citizens Our contention is solely that if citizens are by the State given the right to labor upon public works, that right is by the treaty given also to the alien.

Let us for a moment revert to the provisions of the Chinese treaty which this Court in *Yick Wo* vs. *Hopkins* (supra) said gave to Chinese laborers

equal rights with citizens. That treaty provided only that

> "if Chinese laborers * * * residing in the * * * United States, meet with ill treatment * * * the Government of the United States will * * * secure to them the same rights, privileges, immunities and exemptions as may be enjoyed by the citizens or subjects of the most favored nation, and to which they are entitled by treaty."

The treaty contains nothing respecting "liberty" or "property" or the "right to contract," but, nevertheless, this court, aided by Section 1977 of the Revised Statutes, held that the phraseology of the treaty settled the mantle of protection provided by the Fourteenth Amendment over the Chinese laborers, saying:

> "The questions we have to consider and decide in these cases, therefore, are to be treated as involving the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court."

This conclusion followed the premises theretofore stated by the court, that:

> "The Fourteenth Amendment to the Constitution is not confined to the protection of citizens."

In one of its most recent utterances (*Coppage* vs. *Kansas*, 236 U. S., 240) this court defined (not for the first time) what "liberty" and "property" meant when read in the Fourteenth Amendment:

> "* * * Included in the right of personal liberty and the right of private property —partaking of the nature of each—is the right

to make contracts for the acquisition of property Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other form of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money."

In *Lochner* vs. *New York*, 198 U. S., 45, this Court said:

"The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution * * *. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right. * * *."

In *Smith vs. Texas*, 233 U. S., 630, it was said:

"In so far as a man is deprived of the right to labor, his liberty is restricted. * * *."

In *Southern R. R. Co.* vs. *Green*, 216 U. S., 400, we find this phraseology:

"The equal protection of the laws means subjection to equal laws, applying alike to all in the same situation. If the plaintiff is a person within the jurisdiction of the State of Alabama within the meaning of the Fourteenth Amendment, it is entitled to stand before the law upon equal terms, to enjoy the same right as belong to, and bear the same

burdens as are imposed upon, other persons in a like situation."

In *Allgeyer* vs. *State of Louisiana*, 165 U. S., 570, "liberty" is again discussed:

> "The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

The Court cited Justice Bradley in *Butcher's Union, etc., Co.* vs. *Crescent City, etc., Co.*, 111 U. S., 746:

> "I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States,"

and continued:

> "But if it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, and give to others the exclusive right of pursuing it, it certainly does deprive him to a certain extent of his liberty, for it takes from him the freedom of adopting and following the pursuit which he prefers; which as already intimated is a material part of the liberty of the citizen."

With these definitions in mind, it is impossible to escape the logic of the conclusion that when by treaty subjects of Italy are given the right to

> "*trade* * * * upon the same terms as the natives of the country"

and are accorded

> "*protection* for their * * * *property* and for *their rights*"

with the privilege to

> "enjoy in this respect the same *rights* and *privileges as are or shall be granted to nationals,*"

the State cannot by law withdraw from them the right and privilege to labor upon public works. And this is especially so when we remember that the treaty provision is enforced and illuminated by the mandate of Section 1977 of the Revised Statutes that

> "all *persons* within the jurisdiction of the United States shall have the same right in every State * * * to *make* and *enforce* contracts * * * as is enjoyed by white *citizens.*"

If, therefore, the State of New York cannot directly prohibit a subject of Italy from laboring upon public works, it cannot do it by indirection by prohibiting its contractors from employing him upon such public works. (*Coppage* vs. *Kansas, supra.*)

Other treaties with many other nations grant similar rights. We shall refer to them very briefly.

The treaties with the Argentine Republic, Costa Rica, Japan, Liberia and Paraguay grant protec-

tion to "persons and property" In addition the Japanese treaty authorizes the citizens of each country to

> "carry on trade * * * and generally do anything incident to or necessary for trade upon the same terms as native citizens."

Liberian citizens are also given the right to "reside in and trade to any part of" the United States, and are also granted

> "all other rights and privileges which are or may be granted to any other foreigners, subjects or citizens of the most favored nation."

Paraguayans are also given full liberty to sell to whom they like all articles of lawful commerce.

The treaty with Austria-Hungary gives the right to "sojourn and reside" in the United States "to attend to their commercial affairs."

By the Belgian treaty

> "the privileges, immunities, and other favors, with regard to commerce or *industry*"

(which)

> "shall be enjoyed by the citizens or subjects of one of the two states *shall be common to those of the other.*"

By the Bolivian treaty in addition to the right to "trade," the citizens or subjects of the contracting parties are given the right

> "in all cases" (to) "enjoy the same security and protection as the natives of the country in which they reside."

The subjects of Borneo are given

> "all the privileges and advantages, with respect to commerce *or otherwise,* which are now

> or which may hereafter be granted * * * to the citizens or subjects of the most favored nation."

By the treaties with Chile, Colombia, Denmark, Ecuador, Peru, and Persia, their citizens are given equal privileges of navigation and commerce with citizens of the United States either by express stipulation or by reason of the most favored nation clause. Colombians, Ecuadorians and Peruvians are also given equal "trade" privileges.

The treaty with Paraguay stipulates that the citizens of each country shall have full liberty "to manage their own affairs" * * * and "shall enjoy full * * * protection for their persons and property" and shall enjoy "in this respect, the same rights and privileges as native citizens."

Salvadorians are permitted to engage

> "in all kinds of trade * * * upon the same terms with the native citizens,"

and they

> "shall enjoy all the privileges and concessions in these matters which are or may be made to the citizens of any country."

Servians are authorized by treaty to "carry on their business" and it is stipulated that they

> "shall enjoy in this respect for their persons and property the same protection as that enjoyed by natives or by the subjects of the most favored nation."

The treaty also provides that as to "all other matters connected with trade" the citizens of each shall

> "enjoy the treatment of the most favored nation, and all the rights, *privileges*, exemptions

and *immunities* of any kind enjoyed with respect to commerce and *industry* by the citizens or subjects of the high contracting parties, or which are or may be hereafter conceded to the subjects of any third party."

The Spanish treaty provides that the citizens of each shall

"enter, travel and reside in all parts of their respective territories * * * and they shall enjoy in this respect for the protection of their persons and property the same treatment and the same *rights* as the citizens or subjects of the country or * * * of the most favored nation."

They are also authorized to

"freely exercise their *industry* or their business, without being subjected as to their persons or property to any taxes, general or local, imposts *or conditions whatsoever*, other or more onerous than those which are imposed or may be imposed upon the citizens or subjects of the country or * * * of the most favored nation."

In this treaty laws respecting taxation, commerce, health, police and public security which may be applied to foreigners in general are excepted from the treaty rights secured.

The treaty with Switzerland provides:

"The citizens * * * shall be admitted and treated upon a footing of reciprocal equality * * * where such admission and treatment shall not conflict with the Constitution or legal provisions as well Federal and State as Cantonal of the contracting party.

> The citizens * * * subject to the constitutional and legal provisions aforesaid * * * shall be at liberty * * * to exercise their profession, their industry and their commerce * * *. No pecuniary *or other more burdensome condition* shall be imposed * * * upon the enjoyment of the above-mentioned rights than shall be imposed upon citizens of the country where they reside, *nor any condition whatever to which the latter shall not be subject.*"

The foregoing summaries show that with at least 20 countries (including Italy) treaties exist which in general or particular phraseology grant rights to resident aliens to labor and make contracts upon equality with citizens.

Section 14 of the Labor Law of the State of New York is unquestionably void as to the subjects of these nations.

But the fact that Section 14 of the Labor Law is repugnant to, and void, as against the provisions of so many treaties, is of even greater importance in considering its validity.

This law is a penal statute and must be construed as such. As it is void as to some—indeed many—resident aliens, under well etsablished rules of construction the courts will not discriminate and determine in individual cases when it is valid and when invalid. It is incumbent upon the Legislature of the State of New York to frame a statute affecting such aliens as are not protected by treaty—if indeed in the face of the provisions of Section 1977 of the Revised Statutes, and of the Fourteenth Amendment, any such law could be valid as to any resident alien.

If void as against any treaty—or as against all treaties herein discussed, it is void as to all resident aliens, whether protected by treaty or not.

Wynehamer *vs.* People, 13 N. Y., 378;
Sutherland *on* Statutory Construction, sec. 172-173;
United States *vs.* Reese, 92 U. S., 214;
United States *vs.* Harris, 106 U. S., 629;
Trade Mark Cases, 100 U. S., 82.
Virginia Coupon Cases, 114 U. S., 270.
Baldwin *vs.* Franks, 120 U. S., 679.
Rathbone *vs.* Wirth, 150 N. Y., 459.
Lawton *vs.* Steele, 119 N. Y., 226.

In Wynehamer *vs.* People (*supra*) the Court of Appeals clearly stated this rule (opinion of Selden, J., page 441):

> "Thus the courts would be required over and over again to declare the same legislative provisions both valid and void, as applicable to different classes of cases. This has been in some instances, but with doubtful propriety, tolerated in purely civil cases; but never, I believe, in respect to penal and criminal legislation." * * *

See also *ibid* (opinion of Johnson, J., page 425).

POINT II.

The contract agreement to comply with the law falls with the law itself.

Each contract for subway construction contains a covenant that the contractor will comply with section 14 of the Labor Law, and that if the provisions of said section are not complied with the contract shall be void.

The Court of Appeals of the State of New York has decided that such covenants have no force, after the law which requires them has been declared unconstitutional.

It is true that in *People* vs. *Orange County Road Construction Company*, 175 N. Y., 84, Judge Cullen uttered a dictum that, if the municipality and the contractor should enter into a contract agreement to comply with the Labor Law, such agreement would be binding on both parties, regardless of the law, just as any contract covenant would be binding upon the parties thereto.

And in *People ex rel. Cossey* vs. *Grout*, 179 N. Y., 417, Judge Cullen elaborated his argument, citing the suppositious absurdity of an agreement that employees should wear black hats and black shoes, and arguing that such covenant would be binding.

We may assent to his argument, if we assume that both parties voluntarily, and for any supposed beneficial reason, purposely inserted such a covenant. But a very different rule applies both in the courts of New York State and in the United States Supreme Court, where a covenant has been inserted into a contract by force of an invalid law and without desire or intent other than to abide by the law.

As we have seen, the remark of Judge Cullen in the Orange County Road Company case was a dictum, and his opinion in the Cossey case was not the prevailing opinion on that point. In other cases, the Court of Appeals has squarely met the issue and decided that such a covenant falls with the law itself.

People *ex rel.* Rodgers *vs.* Coler, 166 N. Y., 1 (at pp. 9, 21).

Knowles *vs.* City, 176 N. Y., 430 (at pp. 438-41).

People *ex rel.* Cossey *vs.* Grout, 179 N. Y., 417 (opinion of O'Brien).

This is also the rule in the United States Supreme Court.

> Home Ins. Co. *vs.* Morse, 87 U. S. (20 Wallace), 445, at pp. 458-9 (frequently cited with approval).

POINT III.

The judgment dismissing the complaint was error and should be set aside.

It is conceded (opinion of Cardozo, page 51, opinion of Seabury, page 61) that the State of New York cannot lawfully forbid the employment of aliens by private citizens—the employment of aliens generally—upon such private work as digging for a sewer, or upon such work as digging for and constructing a subway railroad, or upon such other work, similar in nature to other public works, as the construction of the new Erie Canal, the construction of buildings, streets, etc. Such prohibition would offend the constitution, the treaties and the statutes of the United States beyond peradventure or cavil. And the sole question here presented is whether the State of New York can lawfully do this very thing as to the digging, the bricklaying, the concreting, etc., on state and municipal work, without *pro tanto* offending the supreme law.

If the argument of the Court of Appeals be sustained, would not the State of New York, under its regulative powers over corporations created by it, likewise, and by a parity of reasoning, be able lawfully to prohibit such corporations from employing

aliens? It would seem so. And then the alien, invited to our shores, and awaiting his citizenship, could live only by employment by private natural persons. Constitutional, treaty and statutory protection to him would thus be reduced almost to farcical proportions.

No question of the public health, morals or good order can be raised to aid the defense of this law, arbitrarily designed

> "to deprive employers of a part of their liberty of contract to the * * * upbuilding of the labor organizations" (Coppage *vs.* Kansas, *supra*).

It is as void as it is offensive, and the march of events has shown that it was not intended to be enforced, but was designed as a club to be wielded by labor organizations for the control of contracting employers. As soon as it was declared valid it was found to be unworkable, and a substitute therefor was enacted which is equally menacing, and even more unworkable.

The original and amended law are both void and should be so declared.

All of which is respectfully submitted.

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Of Counsel for
Plaintiff in Error.

(86634)

M. B. BROWN PRINTING & BINDING CO., 37-41 Chambers Street, N. Y.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 326.

WILLIAM H. REIM, CRANFORD COMPANY, and FLINN O'ROURKE COMPANY, Inc.,
Plaintiffs in Error,

vs.

EDWARD E. McCALL, MILO R. MALTBIE, J. SARGENT CRAM, GEORGE V. S. WILLIAMS and ROBERT C. WOOD, as Members of and Constituting the Public Service Commission for the First District of the State of New York,
Defendants in Error.

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UPREME COURT OF THE UNITED STATES.

ILLIAM E. HEIM, CRANFORD COMPANY and FLINN-O'ROURKE COMPANY, INC., Plaintiffs-in-Error, *against* EWARD E. MCCALL, MILO R. MALTBIE, J. SARGEANT CRAM, GEORGE V. S. WILLIAMS and ROBERT C. WOOD, as Members of and Constituting the Public Service Commission for the First District of the State of New York, Defendants-in-Error.	October Term, 1915. No. 386.

RROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

rief for Plaintiff-in-Error William E. Heim.

STATEMENT.

The Federal question presented for the consideration of the Court by the present record is ether a statute of New York, Section 14 of the oor Law (Chap. 31 of the Consolidated Laws), valid and constitutional. That section reads as lows:

"§14. *Preference in employment of persons upon public works.* In the construction of public works by the state or a municipality, or by persons contracting with the state or such municipality, only citizens of the United States shall be employed; and in all cases where laborers are employed on any such public works, preference shall be given citizens of the State of New York. In each contract for the construction of public works a provision shall be inserted, to the effect that, if the provisions of this section are not complied with, the contract shall be void. All boards, officers, agents or employees of cities of the first class of the state, having the power to enter into contracts which provide for the expenditure of public money on public works, shall file in the office of the commissioner of labor the names and addresses of all contractors holding contracts with said cities of the State. Upon the letting of new contracts the names and addresses of such new contractors shall likewise be filed. Upon the demand of the commissioner of labor a contractor shall furnish a list of the names and addresses of all sub-contractors in his employ. Each contractor performing work for any city of the first class shall keep a list of his employees, in which shall be set forth whether they are naturalized or native-born citizens of the United States, together with, in case of naturalization, the date of naturalization and the name of the court where such naturalization was granted. Such lists and records shall be open to the inspection of the commissioner of labor. A violation of this section shall constitute a misdemeanor and shall be punishable by a fine of not less than fifty dollars nor more than five hundred dollars, or by imprisonment for not less than thirty nor more than ninety days, or by both such fine and imprisonment."

The question of the validity and constitution-

ality of this statute arises in an action, brought by the plaintiff-in-error William E. Heim, to restrain the Public Service Commission for the First District of the State of New York from declaring certain contracts for the construction of portions of the Rapid Transit Subway System of the City of New York void and forfeited, because of the employment by the contractors of laborers who are not citizens of the United States and who are not citizens of the State of New York.

Facts.

As stated above, the action is brought for an injunction against the Public Service Commission for the First District of the State of New York. It was instituted in the Supreme Court, New York County, and after service of the summons and complaint upon the defendants Edward E. McCall, Milo R. Maltbie, J. Sargeant Cram, George V. S. Williams and Robert C. Wood as members of and constituting such Public Service Commission, the defendants Cranford Company and Flinn-O'Rourke Company, Inc., on their own motion, were made parties defendant, because they held certain of the contracts, the validity of which, it was claimed, might be affected by the decision of the case. The defendants, McCall and others, as members of and constituting such Public Service Commission, demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. (Record, p. 55). The defendants, Cranford Company and Flinn-O'Rourke Company, Inc., have not yet pleaded to the complaint by answer or demurrer, but in all the courts below have been represented by counsel and have united in the request of the

plaintiff-in-error Heim for the relief demanded in the complaint. On the argument in the Courts below, Mr. John A. Gill was allowed to appear as *amicus curiae*, by his attorney.

On the return day of an order to show cause why plaintiff should not have an injunction, *pendente lite*, restraining the defendants Edward E. McCall and others, as members of and constituting the Public Service Commission for the First District of the State of New York, from doing any of the acts alleged by the plaintiff to be wrongful and illegal, a motion for judgment upon the pleadings was entertained by the Supreme Court of New York County, by consent of counsel. On that motion a decision was handed down sustaining the demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. (Record, p. 5.) Upon this decision final judgment was entered in the office of the Clerk of New York County on the 12th day of December, 1914, sustaining the demurrer to the complaint on that ground and dismissing the complaint with costs. (Record, p. 4.)

From this judgment of the Special Term plaintiffs-in-error appealed to the Appellate Division of the Supreme Court, First Department, and that court, by judgment entered in the same Clerk's office on the 6th day of January, 1915, unanimously reversed the judgment of the Special Term, and granted the relief prayed for in the complaint. (Record, p. 73).

From the judgment of the Appellate Division, the defendants McCall and others, as members of and constituting such Public Service Commission, appealed to the Court of Appeals, (Record, p. 84), and that court, by a divided bench, reversed the judgment of the Appellate Division and af-

firmed the judgment of the Special Term, sustaining the demurrer to the complaint upon the ground that it failed to state facts sufficient to constitute a cause of action, and dismissing the complaint, with costs in all courts. (Record, p. 85).

To review the decision of the Court of Appeals sustaining the demurrer, the plaintiff-in-error petitioned for the allowance of a writ of error, returnable into this court, and for a citation and supersedeas. The prayer of said petition was granted and the writ allowed by Associate Justice Charles E. Hughes of this court. This case has been advanced upon the calendar of each of the courts below, by special permission of the court, on the request of all parties, and has been advanced and placed upon the calendar of this court for October 12, 1915, by like permission, because of the importance and urgency of having an early and final decision of the questions involved.

The facts set forth in the complaint and admitted by the demurrer are as follows:

The plaintiff is a taxpayer and as such has brought this action, under the authority of Section 1925 of the Code of Civil Procedure of the State of New York, Section 51 of the General Municipal Law of the State of New York, and Section 59 of the Charter of The City of New York, to restrain and prevent acts alleged to be illegal, threatened and about to be done by the Public Service Commission for the First District of the State of New York, composed of the defendants-in-error; and also to prevent waste of the public funds of The City of New York, and damage and injury to the residents and taxpayers thereof. (Record, pp. 10, 21, 22).

The following facts stated in the complaint

will show the threatened acts alleged to be illegal, and the grounds upon which the plaintiff seeks to have them enjoined:

In the year 1891, the Legislature of the State enacted what was known as the Rapid Transit Act authorizing the construction and operation, by The City of New York, of subway railroads for public convenience and benefit. (Record, p. 11). Pursuant to the authority conferred by the act and the amendments thereof, the city, in September, 1900, entered into a contract, known as Contract No. 1, with John B. McDonald, for the construction of the subway routes described in it, and later entered into what is known as Contract No. 2 for the construction of another portion thereof, which routes practically constitute the existing subway as now operated. (Record, p. 11.)

Railroads were constructed and completed on the routes described in Contract No. 1, and the same put in operation in the fall of 1904. Thereafter the railroad was built upon the route described in Contract No. 2, and has been completed and in operation for several years. (Record, p. 11). Still later, as more fully appears by the statement of facts in the complaint, and pursuant to the authority contained in the said Rapid Transit Act and certain amendments thereto, the Public Service Commission, in conjunction with the city authorities, determined upon many extensions to the existing subway, which was owned by the city and operated under lease by the Rapid Transit Subway Construction Company, and their connection with the existing subway, and also their connection with existing surface and elevated roads, owned by private corporations, with a view of furnishing a comprehensive system of rapid transit for the benefit of the City of New

York, and its residents and taxpayers, on the basis of a single five-cent fare, with general transfer privileges. (Record, pp. 11, 12.)

The plan contemplated and provided for the ownership by the city of all new subways to be built. It also contemplated and provided that, in view of the fact that the city did not have sufficient funds and could not raise the same without exceeding the debt limit to which it was restricted by statute and the constitution, private capital must be supplied by individuals or corporations, sufficient, in conjunction with the moneys available for that use by the city, in whole or in part to complete the system; that its equipment for operation should be wholly provided for by private capital, and that a lease of the said system, when completed, might be made with the party or parties who would supply the capital for construction and equipment as stated. (Record, p. 13).

In pursuance of said plan, bids were called for in the year 1909, by the Public Service Commission, for construction, equipment and operation of the whole system, and simultaneously bids were also invited for construction of the different sections of the routes so planned (Record, p. 16). No bids were received for equipment, construction and operation, but many bids were received on different sections of the routes, for construction only. (Record, p. 25, et seq.)

Negotiations were thereupon taken up by the Public Service Commission and the Board of Estimate and Apportionment of The City of New York, with the Interborough Rapid Transit Company and the Brooklyn Rapid Transit Company, with a view to entering into agreements with said companies to supply the capital requi-

site for the construction and equipment of the routes, or so much thereof as the city was not in a positon to provide. (Record, p. 13.)

The outcome of the negotiations and plans of the city and the Public Service Commission, was the contracts, in the year 1913, for construction, equipment and operation, with the Interborough Company and the New York Municipal Railway Corporation, which are described in the complaint. (Record, pp. 13 to 15).

As appears more fully from the provisions of these contracts set forth in the complaint, the Interborough Company was to supply one-half of the cost, not exceeding $58,000,000.00, for the construction of the routes described in its contract, and the entire cost of equipping the same for operation, and the city the balance, (Record, p. 14); and the New York Municipal Railway Corporation, which was formed in the interests of the Brooklyn Rapid Transit Company, was to supply $13,500,000.00 for equipment of the portion of the routes which it was to construct under its contract, and $26,000,000.00 for improvements and extensions to its own existing system, which it agreed to connect with the new routes and operate upon a basis of a single fare of five cents, with general transfer privileges. (Record, pp. 14, 15.) The Interborough Company also agreed to operate the portion of the route which it was to equip, in connection with the existing subway and other roads controlled by it, on the basis of a five-cent fare, with general transfer privileges. Leases were to be given to the Interborough Company, in the one instance, of the route it was to lease and operate, and to the New York Municipal Railway Corporation, in the other instance, of the route it was to lease and operate, for given

terms, with the right of recapture by the City, after ten years, on certain terms fixed in the contracts. (Record, pp. 14, 15.)

In the case of the Interborough Company, the receipts from existing and new subway lines were to be pooled, and from the gross receipts of both lines there were to be deducted and paid in the order named (deficits to be cumulative, with compound interest):

(a) Operating expenses; allowance for depreciation, renewals and obsolescense; taxes, insurance and rentals payable to the City under existing subway contracts;

(b) The sum of $6,335,000, per annum, to be retained by the company, representing the average annual income received by it from the operation of the existing subway lines and equipment for the two fiscal years ending June 30, 1911;

(c) A sum to be retained by the company, equal to 6% per annum upon the investment of the company of the new lines, estimated at $80,000,000, $58,000,000 for new construction and $22,000,000 for new equipment;

(d) A sum to be paid to the city equal to the interest and sinking fund charges upon the bonds issued by the city for the construction of new lines, and in addition, such further sum as will bring the payments to be made to the City up to an amount equal to 8.76% upon its expenditures; and the balance, if any, was to be divided equally between the City and the company. (Record, p. 14.)

In the case of the New York Municipal Corporation, the receipts from the existing system and the new subway lines were to be pooled, and from the

gross receipts of both lines there were to be deducted and paid in the order named (deficits to be cumulative):

(a) Cost of operation, which shall include operating expenses, taxes, rentals of leased property used in operation and allowance for depreciation and renewals;

(b) The sum of $3,500,000 to be retained by the company, representing the average annual income of the New York Consolidated Railroad Company from the operation of its existing lines;

(c) A sum to be retained by the company equal to 6% per annum upon the investment of the company in the new lines;

(d) A sum to be paid to the city, equal to the interest and sinking fund charges upon the bonds issued by the City for the construction of the new lines; and the balance, if any, was to be divided equally between the City and the company. (Record, p. 15).

In the negotiations which resulted in these contracts, it was determined that the time required for construction, equipment and operation should not exceed four years, and the contracts provide that the Dual System should be completed and in operation in the year 1917.

It was recognized that the Rapid Transit Act did not authorize the carrying out of the plans and the making of contracts on the basis stated, and the legislature was appealed to. The legislature, by amendment to the Act, Chapter 226 of the Laws of 1912, conferred ample powers upon the Public Service Commission and the city to carry out the plans mentioned and to enter into the contracts referred to.

Contracts have been let for the construction of various sections, as set forth in the complaint, to the various contractors therein mentioned, amounting in all to $111,918,256.58. They are in the process of performance at different stages, some of them being completed to the extent of 75% and more, and the contracts, in each instance, require completion at fixed dates, well within the time contemplated by the general plan adopted by the city authorities and the contracts with the Interborough and the New York Municipal Railway Corporation. (Record, pp. 17, 18.)

It is further set forth that during the performance of Contracts Nos. 1 and 2, alien labor was employed to a large extent, and necessarily employed, without objection, and that in each of the contracts for construction set forth in the complaint the contractors are and have been from the beginning of work thereunder, largely employing alien labor, without objection from anyone, until a very short time since, when certain citizens of the city insisted that under Section 14 of the Labor Law the employment of alien labor was forbidden; and that the effect of such employment was a forfeiture of all contracts in the performance of which such labor was employed. (Record, pp. 17 to 20.)

It is further set forth that the contractors in making their bids and executing their contracts regarded said section of the Labor Law as void and that there is an insufficiency in the supply of citizen labor, and that it will be impossible to complete the Dual System within the time contemplated, if alien labor may not be employed, or to do the work called for within the amounts estimated and provided for the same, pursuant to said plans and contracts, namely, $212,000,000;

and that it will also be impossible for the various contractors to perform their contracts within the time stipulated or for the amounts therein fixed, unless such alien labor be employed. (Record, pp. 14, 17, 18).

The contracts with the various contractors, provide that the chief engineer of the Public Service Commission shall each month furnish to the Commission his estimate of the value of all work done during the preceding month, and that upon approval of such monthly estimates by the commission, the comptroller shall issue his warrant for and the contractor shall receive 85% or 90% of the amount thus estimated and approved, in order to enable him to do the work and meet the expenditures called for by the contract. (Record, pp. 19, 20). Without such monthly payments the contract work must be stopped as the contractors cannot and will not proceed therewith.

After receiving notice from the citizens above mentioned that construction contractors were employing alien labor in disregard to the provisions of Section 14 of the Labor Law, which were made a part of their contracts by reference to that section and agreement to observe it, the Public Service Commission threatened to and was about to terminate their contracts on account of such violation of the Labor Law, upon the ground that the employment of alien labor worked a forfeiture of them. The Commission also refused to certify the monthly estimates of the engineer, so as to enable the contractors to get their pay, and threatened to continue to do so. (Record, pp. 20, 21.)

The complaint also alleges (Record, p. 18) that the said contractors "constantly employed and now employ a large number of laborers and mechanics who are residents of The City of New

York but who, * * * although citizens of the United States, were not citizens of the State of New York, and did not give preference to citizens of the State of New York, over such laborers so employed, who were not citizens of the State of New York, but were citizens of the United States"; and that (Record, p. 20) "said Public Service Commission * * * have threatened and declared there intention in the event of violations of Section 14 of the Labor Law being proved, to declare each and all of said contracts * * * * void."

When this situation arose, the plaintiff-in-error Heim brought action to restrain and enjoin the Public Service Commission from terminating the contracts, and to require it to continue to approve the engineer's monthly estimates for the work done, claiming that Section 14 of the Labor Law was null and void as being repugnant to the provisions of the constitutions of the State of New York and the United States, and also to treaties existing between this country and the Kingdom of Italy, and other foreign nations, securing to the citizens of such foreign nations the rights enjoyed by citizens of the United States. (Record, p. 17.)

It is also alleged that the Interborough Company is a party to many of the contracts for construction; that the New York Municipal Railway Corporation, as well as the various construction contractors, have contract rights which have been violated by the said illegal acts, to the great injury of plaintiff-in-error Heim and the other taxpayers of the City. (Record, pp. 21, 22.)

The nature and extent of the injury and damage sought to be prevented in this action, and the illegal acts, may be briefly indicated as follows: (Record, p. 21)

(1) The contracts already in existence at different stages of completion are 81 in number and aggregate $111,918,256.58. Each of the contractors will have a good cause of action against the City for the recovery of anticipated profits, in case the contracts are improperly terminated, which will likely aggregate an enormous sum and for which the City will have received no return.

(2) The City will be involved in most extensive and expensive litigation.

(3) The completion of the subway system will be indefinitely delayed, if not wholly prevented.

(4) The estimated cost of construction provided for under the contracts with the Interborough Company and the New York Municipal Railway Corporation will be largely exceeded, the purpose of these contracts probably defeated, and the public deprived of the benefit of the subway system as planned, while the money already expended by the City will have been wasted.

(5) The situation in regard to subway contracts will be thrown into chaos and confusion and the situation in regard to other municipal contracts will be little, if any, better.

(6) The corporate rights of the City will be violated.

(7) The rights and immunities of citizens of sister states guaranteed by the Federal Constitution will be contravened.

(8) The rights secured to aliens under our State and Federal Constitutions, as well as by existing treaties, will be violated, not only to their injury and damage, but also to the injury and damage of the public, and in violation of the policy of and treaties with the United States Government.

(9) The rights of contractors will be violated in that their right to employ such labor as they choose will be denied, and their contracts forfeited.

(10) A reduction in labor available will increase the cost of the same and thus bring an added and unwarranted burden upon the city and its taxpayers.

The legal questions before this court, upon the pleadings and under the judgment directed, are:

(1) Do the provisions of Section 14 of the Labor Law, assuming it to be valid, apply to the subway contracts set forth in the complaint?

(2) Are the provisions of said section void as being repugnant to the provisions of the Constitution of the United States?

(3) Are the provisions of Section 14 of the Labor Law void as being in conflict with existing treaties between the United States and foreign nations?

(4) Assuming the provisions of said section to be valid, have they been superseded or repealed by the provisions of the Rapid Transit Act and the Amendments thereto as regards subway contracts, or have the defendants waived the right to enforce the same, or, are they estopped from enforcing them by reason of their acts and omission to act and the facts set forth in the complaint?

(5) Was it within the power of the legislature to impose the penalty of forfeiture of contracts for failure to comply with the provisions of said section, or to make acts, innocent in their nature, criminal offences?

(6) Are the covenants in the contract enforceable, if Section 14 of the Labor Law is invalid?

SPECIFICATION OF ERRORS.

I. The Special Term of the Supreme Court of the State of New York, and the Court of Appeals of that State, and each of said courts, erred in refusing to hold and in overruling the claim of the plaintiffs in error, and each of them, that Section 14 of Article 2 of Chapter 36 of the Laws of 1909, comprising Chapter 31 of the Consolidated Laws of the State of New York and known as the Labor Law (of which a copy is set forth at page 2 of this brief) is repugnant to the Constitution of the United States, particularly to the following articles and sections of the said Constitution, and the following articles and sections of the Amendments to the said Constitution, and each of them, in the respects mentioned and otherwise, to wit:

To Article 1, §10, of the Constitution, in that said §14 of the Labor Law is an *ex post facto* law and is a law impairing the obligation of contracts;

To Article 4, §2, of the Constitution, in that said §14 of the Labor Law denies to citizens of each State, other than the State of New York, the privileges and immunities granted to citizens of the State of New York;

To Article 6, §2, of the Constitution, in that said §14 of the Labor Law contravenes, and is repugnant to the Constitution of the United States and the laws of the United States made in pursuance thereof and certain treaties made under the authority of the United States, which said Constitution, laws and treaties are the supreme law of the land;

To Article 14, §1 of the Amendments to the Constitution, in that the said Section 14 of the Labor Law is a law which abridges the privileges or immunities of citizens of the United States and deprives persons of liberty and property and each of them, without due process of law, and denies to persons within the jurisdiction of the State of New York the equal protection of the law.

II. The said Special Term and the said Court of Appeals and each of said courts, erred in holding that said section of said Labor Law was valid, and legally prohibited the employment of aliens in work necessary to perform the subway construction contracts described in the amended complaint and legally gave preference to citizens of the State of New York over citizens of other states in such employment, notwithstanding the provisions and guarantees of said United States Constitution and of said treaties.

III. The said Special Term and the said Court of Appeals, and each of said courts, erred in refusing to hold and in overruling the claim of the plaintiffs-in-error, that said Section 14 of the Labor Law is repugnant to the treaties of the United States with foreign powers and particularly to the treaty of the United States with the Kingdom of Italy, and hence void.

IV. The said Special Term and the said Court of Appeals, and each of said courts, erred in failing and refusing to hold that said Section 14 of the Labor Law was invalid because it denied to citizens of other States equal rights and immunities and equal protection of the laws, which its own citizens enjoy, and in not recognizing and enforcing, but on the contrary, denying to aliens employed in the construction of the subways mentioned in the amended complaint, equal protec-

tion of the laws, and the same rights to labor and the same immunities and privileges enjoyed by the citizens of the United States.

V. The said Special Term and the said Court of Appeals, and each of said courts, erred in failing and refusing to hold that the said section of the Labor Law was invalid as violating the provisions of the Constitution of the United States and the treaties above referred to, giving and guaranteeing the contractors mentioned in the said amended complaint the right to employ aliens or citizens of other states, and to such aliens and citizens of other states the same right to labor, as exists as regards citizens of the State of New York or of the United States.

VI. The said Special Term and the said Court of Appeals, and each of said courts, erred in holding and deciding that said Section 14 of the Labor Law was valid as an exercise of the police power of the state.

VII. The said Court of Appeals erred in holding that the moneys and funds provided for the construction of the subways mentioned in the amended complaint were the property of the State of New York and that the said State had power and right to direct and determine the employees to whom such moneys might be paid, and to exclude aliens.

VIII. The said Special Term and the said Court of Appeals, and each of said courts, erred in failing and refusing to hold and decide that said Section 14 of the Labor Law was in violation of the rights of the City of New York and that, in the construction of the said subways, that city is acting, not as an agency or arm of the state government, but rather, in so doing and

in making the contracts providing for their operation and construction, the said city was and is in reality a private corporation and acting as such, and is entitled to the same protection and rights under the constitution of the United States as an individual or private corporation would be entitled to under similar circumstances.

IX. The said Special Term and the said Court of Appeals, and each of said courts, erred in depriving the said City of New York of its vested rights to build and construct a system of subways which had been inaugurated, and, to a large extent, carried out and constructed, prior to the enactment of the said section 14 of the Labor Law, and the completion of which was essential to the full and complete enjoyment of the said vested rights thus antedating, and existing prior to, the enactment of the said section of the Labor Law.

X. The said Special Term and the said Court of Appeals and each of said courts, erred in failing and refusing to hold that the increased cost of the said subways thus authorized, resulting from the prohibition of the employment of alien labor was the taking of property of the City of New York without due process of law, and hence that said section of the Labor Law was void.

XI. The said Special Term and the said Court of Appeals, and each of said courts, erred in failing and refusing to hold that the people of the State of New York were estopped from enforcing the said section 14 of the Labor Law by reason of the facts stated in the amended complaint and admitted by the demurrer.

XII. The said Special Term and the said Court of Appeals, and each of said courts, erred in failing and refusing to hold that the construc-

tion contracts mentioned in the amended complaint were not of the character of public contracts mentioned in the said section 14 of the Labor Law, and that the said section 14 was never intended to apply to the contracts mentioned in the said amended complaint, or any of them.

XIII. The said Special Term and the said Court of Appeals, and each of said courts, erred in failing and refusing to hold that the said section 14 of the Labor Law was waived by reason of the facts set forth in the amended complaint, and admitted by the demurrer.

XIV. The said Court of Appeals erred in reversing and setting at naught the injunctive relief granted by the Appellate Division of the Supreme Court, First Department, to the following effect:

(a) Restraining and enjoining the defendants, Edward E. McCall, Milo R. Maltbie, J. Sargeant Cram, George V. S. Williams and Robert C. Wood, as members of and constituting the Public Service Commission for the First District of the State of New York, and each and all of them, their deputies, clerks, agents, attorneys and assistants, from declaring any of the contracts mentioned in the amended complaint, and Schedule "A" thereto attached, void or forfeited because of the employment of laborers who are not citizens of the United States, and who are not citizens of the State of New York, as specified in the said amended complaint;

(b) Restraining and enjoining said Public Service Commission, and the members thereof from refusing and omitting to prepare and certify vouchers for eighty-five (85) or ninety (90)

per cent. of the amounts stated in the monthly estimates, made and certified in writing to the said Commission by its Chief Engineer, for work done under said contracts, in accordance with the practice heretofore followed, as set forth in said amended complaint and as provided for in said contracts.

XV. The said Court of Appeals erred in dismissing the complaint of the plaintiff and in rendering and directing judgment as shown in its remittitur.

ARGUMENT.

I.

Assuming that Section 14 of the Labor Law in question in terms applies to the subway construction contracts mentioned in the complaint, the threatened action of the Public Service Commission to terminate said contracts, because of non-compliance by contractors with the provisions of said statute, and its refusal to approve and certify the engineer's estimates are, nevertheless, illegal acts, inasmuch as they are based upon said section of the Labor Law which is and was illegal and void, because it contravenes the provisions of the Constitution of the United States in that

(a) It is in violation of the corporate rights of the City of New York and of the rights of the residents and taxpayers therein;

(b) It is in violation of the rights of the various subway contractors with the city;

(c) It is also in violation of the rights of aliens and of citizens of other States resident here.

1. PROVISIONS OF THE UNITED STATES CONSTITUTION WITH WHICH IT IS IN CONFLICT.

(a) Article I, Section 10, providing:

> "No state shall * * * pass any * * * *ex post facto* law, or law impairing the obligation of contracts."

(b) Article IV, Section 2, reading as follows:

> "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

(c) Section 1 of the Fourteenth Amendment providing and defining who shall constitute citizens of the United States and of the various states, and among other things providing that

> "No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

(d) Article VI, Section 2, reading as follows:

> "This Constitution and the Laws of the United States which shall be made in pursuance thereof and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the Constitution or the laws of any state to the contrary notwithstanding."

2. CORPORATE OR PRIVATE RIGHTS OF CITIES, AS CONTRADISTINGUISHED FROM THEIR RIGHTS AS BODIES POLITIC.

Before beginning discussion of this subject, we desire to call attention to the rights conferred by the provisions of the ancient charters of the City of New York, as well as to their express confirmation by statute and constitutional provisions.

(a) By the Nicolls charter (1665), it was provided that the inhabitants of Manhattan Island "are, and forever shall be, accounted, nominated and established as one body politic and corporate."

This charter was confirmed by proclamation of Governor Andros in 1674.

(b) The Dongan charter (1686) recites the rights and privileges of New York as "an ancient city," and confirms the same, including all the franchises, privileges and rights theretofore enjoyed.

(c) The Cornbury charter (1708) granted some extra privileges.

(d) The Montgomery charter (1732) granted on the petition of the Common Council, recited various rights and franchises possessed by the city theretofore, and confirmed the same, and also gave certain additional ones, including the right to maintain ferries, with the "profits" and "fees," etc., attaching thereto; also the right to maintain "wharves, docks, cranage and wharfage, and profits which may arise therefrom."

(e) By an act of the Colonial Assembly, which became a law October 14, 1732, all its rights as a body politic or corporate were confirmed.

(f) The Constitutions of 1777 and 1821 provided that nothing therein contained "should annul any charters to bodies politic made prior to the 14th day of October, 1775."

To more fully show the corporate and proprietary rights of the city under the various charters and acts referred to, we have printed pertinent extracts therefrom in the appendix to this brief.

It is now well settled that a municipal corporation possesses two kinds of powers, "one gov-"ernmental and public, and to the extent they "are held and exercised it is clothed with sov-"ereignty; the other private, and to the extent "they are held and exercised it is a legal in-"dividual."

Lloyd v. New York, 5 N. Y., 369, 374;
People ex rel. Rodgers v. Coler, 166 N. Y., 1;
People ex rel. Cossey v. Grout, 179 N. Y., 417;
Bieling v. Brooklyn, 120 N. Y., 105, 106;
Dillon on Municipal Corporations (5th ed.), I §39;
Charter of City of N. Y., §59.

This distinction is clearly stated in *People ex rel. Rodgers v. Coler* (166 N. Y., 1).

O'Brien, J., says (page 19):

> "But while such municipal corporations are made use of in state governments, they have other objects and purposes peculiarly local, in which the state at large, except in conferring the power and regulating its exercise, is legally no more concerned than it is in the individual and private concerns of its several citizens, and it is from the standpoint not of state interest, but of local interest, that the necessity of incorporating cities and villages most distinctly appears. With respect to property and contract rights of exclusively local concern, the state has no right to interfere and control by compulsory legislation the action of municipal corpora-

tions. The people of the state at large, through their representatives, have no more authority to dictate to a city the form in which its contracts will be framed or the wages that it shall pay to laborers than they have to dictate to an individual what he shall eat, drink or wear. A municipal corporation, in matters affecting its property and its private contract rights, enjoys practically the same immunity from legislative interference for the benefit of private corporations or individuals as is accorded to business corporations and private citizens. (People ex rel. Park Comrs. v. Detroit, 28 Mich., 228; Loan Asso. v. Topeka, 87 U. S. (20 Wall.), 655; People ex rel. D. W. & P. R. R. Co. v. Batchellor, 53 N. Y., 128; Wiesmer v. Village of Douglas, 64 N. Y., 91; Board of Education v. Blodgett, 155 Ill., 441.)"

In the case of *Matter of Rapid Transit R. R. Commissioners* (197 N. Y., 81), the court said (page 96) in answer to the question— "Was the action of the city in building the subway governmental or proprietary in character?":

"The city owns the subway, *and it is a railroad corporation,* so far as the construction, operation and leasing thereof is concerned. It was not required, but simply permitted, to build and operate the road. It is authorized to lease its railroad, either for a 'specified sum of money or a specified proportion of income, earnings or profits'; or it may operate the road itself and charge such rates of fare for the transportation of persons and property as may be fixed by its boards and officers. (L. 1909, ch. 498, §§27 and 30.) In other words, the subway is a *business enterprise* of the city, through which money may be made or lost, the same as if it were owned *by an ordinary railroad corporation.* It was built by and belongs to the city *as a proprietor,* not as a sovereign. (Maximilian v.

Mayor, etc., of N. Y., 62 N. Y., 160; Missano v. Mayor, etc., of N. Y., 160 N. Y., 123; South Carolina v. United States, 199 U. S., 437.)" (Italics ours.)

The Court then points out that the use made by a city of a street for subway purposes is not "a street use," as it would be in the case of sewers, electric lights and water mains.

The city, in the exercise of its corporate powers and the enjoyment of its corporate rights, it is also well settled, is entitled to the same protection as an individual or private corporation, under the constitutions both of the United States and of the State.

People v. Ingersoll, 58 N. Y., 1, at p. 29;
People v. Fields, 58 N. Y., 491;
Santa Clara Co. v. South. Pacific R. R., 118 U. S., 394;
Gloucester Ferry Company v. Pennsylvania, 114 U. S., 196, 204;
Insurance Company v. Morse, 20 Wall., 445, 455;
Hunter v. City of Pittsburgh, 207 U. S., 161, 179.

As we think it must be conceded beyond question that in the matter of providing rapid transit and in the adoption and carrying out of the plans for the same, as well as in making the contracts referred to in the complaint, the city is acting solely in its corporate capacity, we might safely rest upon the foregoing as showing its rights to be the same as those of an individual under similar circumstances and equally protected by the Constitution. However, in view of the importance and far-reaching effect of the questions involved, and the claim on the part of the

defendants, that the city is an arm or agency of the State government, and that the moneys expended in subway construction belong to the state, and that statutory direction or control is simply in the nature of a direction from a principal to its agent, and hence violates no right of the city, it may be well to review the authorities at some length to show the position thus taken is untenable.

The case of *People v. Common Council of Detroit* (28 Mich., 227), is so clearly in point as showing the difference between the rights of the municipality as an agency of the State and its rights as a corporation or legal individual, and that the Legislature's power, while it is supreme in regard to the former, is greatly limited as to the latter, indeed, that it is without authority to interfere with its corporate business in any substantial way, and contains such cogency of reasoning and wealth of illustration in support of principles so clearly applicable to the present case, as showing the invasion of the rights of the city by the statute in question, that it may be regarded as a controlling authority.

Among other things, JUDGE COOLEY says (p. 238):

> "Indeed, the history of municipal corporations in the country from which we derive our institutions will show that they first came into existence by spontaneous local action of their members, taken for their own benefit and protection, and that their recognition and employment as agencies of a character which can be called public, considered with reference to the realm at large, was later, and was based rather upon their local, and what may be called their private wealth, influence and importance, already existing and established, than upon any necessity that such corporations should be created and should exist for the purposes of general government. *The government found convenient*

instrumentalities in existence, and it made use of them for its purposes; but they were first brought into existence from considerations which addressed themselves to the corporators, *and concerned their individual protection, prosperity and welfare.*" (Italics ours.)

Again at page 239 it is said:

"But it cannot be contended that authority in the legislature to determine what shall be the extent of capacity in a city to acquire and hold property, is equivalent to or contains within itself the authority to deprive the city of property actually acquired by legislative permission. As to the property it thus holds for its own private purposes, a city is to be regarded as *a constituent in State government,* and is entitled to the *like protection in its property rights* as any natural person who is also a constituent. The right of the State as regards such property is a right of regulation, and though broader than exists in the case of individuals, is not a right of appropriation. The constitutional principle that no person shall be deprived of property without due process of law, *applies to artificial persons* as well as natural, and to *municipal corporations* in their *private capacity,* as well as to corporations for manufacturing and commercial purposes." (Italics ours.)

Dillon on Municipal Corporations (5th ed.), I —§39, says:

§39. *Private and Corporate Interests.*
* * *

"As respects the usual and ordinary legislative and governmental powers conferred upon a municipality, the better to enable it to aid the State in properly governing that portion of its people residing within the municipality, such powers are in their very

nature public, although embodied in a charter and not conferred by laws general in their nature and applicable to the entire state. But powers or franchises of an exceptional, or extraordinary or non-municipal nature may be, and sometimes are, conferred upon municipalities, such as are frequently conferred upon individuals or private corporations. Thus, for example, a city may be expressly authorized in its discretion to erect a public wharf and charge tolls for its use, or to supply its inhabitants with water or gas, charging them therefor, and making a profit thereby. In one sense such powers are public in their nature, because conferred for the public advantage. In another sense they may be considered private, because they are such as may be, and often are, conferred upon individuals and private corporations, and result in a special advantage or benefit to the municipality as distinct from the public at large. In this limited sense, and as forming a basis for the *implied civil liability for damages* caused by the negligent execution of such powers, it may be said that a municipality has a *private* as well as a *public* character. And so, as hereafter shown, a municipality may have property rights which are so far private in their nature that they are *not held at the pleasure of the legislature.*" (Italics ours.)

In *Albany County v. Hooker, et al.* (204 N. Y., 1), the Court points out that the State in the exercise of sovereign power, does so in part by dividing the territory into counties, and (page 9)

"imposing upon them certain governmental "and political powers and duties. It has been "and is a convenient way of exercising its "sovereign authority. In the exercise of "*such powers* and in the performance of "*such duties* the counties are *mere agents of* "*the State* and component parts of it." (Italics ours.)

It then proceeds to show that (page 10):

> "Counties, in their exercise of their powers and duties as component parts of the State, have acquired real and personal property and have exercised certain corporate powers *that are distinct from their governmental and political powers and duties.* In the exercise of *such corporate powers* they have, because of lack of express statutory recognition as corporations, been treated as *quasi* corporations and have sued and been sued as such; but authoity to sue and be sued as *quasi* corporations has been restricted to matters pertaining to the county in its *corporate capacity* as distinguished from its *governmental and political capacity.*" (Italics ours.)

(See also the cases cited in the opinion to illustrate the distinction between the rights mentioned.)

In *People of the State of New York v. Ingersoll* (58 N. Y., 1), the State brought suit through the Attorney General to recover funds—the proceeds of bonds issued by the County of New York —alleged to have been misappropriated by the defendant and others. The bonds were issued pursuant to statute, and it was alleged that the proceeds thereof were improperly used to pay fictitious claims which were wrongfully and fraudulently audited against the County. The question arose on demurrer as to whether the State could maintain such an action and, it was held that

> "The title to and ownership of the money "sought to be recovered must determine the right of action."

The County of New York was held to be the owner of the proceeds of the bonds and consequently, *in its corporate capacity,* the proper party to bring the action.

It was also held that municipal governments are trustees of the people of the municipality and that (p. 29)

> "their power "as well as duty, is restricted to the protection and preservation of property possessed by them in their corporate capacity. (Town of Guilford v. Supervisors of Chenango, 13 N. Y., 143; Mayor of Georgetown v. Alexandria Canal Co., 12 Peters, 91.) This trusteeship and corporate power, as a pecuniary and fiduciary relation, extends to and embraces not only the tangible property of the corporation, but the franchises and powers conferred for raising moneys and other means for the support of the local government and the use of the inhabitants of the county, and to the means realized from the franchises and powers conferred. * * * In political and governmental matters the municipalites are the representatives of the sovereignty of the State, and auxiliary to it; in other matters, relating to property rights and pecuniary obligations, they have the attributes and the distinctive legal rights of *private corporations* and may acquire property, create debts, and sue and be sued as other corporations; and in the borrowing of money and incurring of pecuniary obligations in any form, as well as in the buying and selling of property within the limits of the corporate powers conferred, *they neither represent or bind the State.*
>
> "The relation of *principal and agent does not and cannot exist,* for obvious reasons, between the State and the various municipal corporations, created with power to contract debts in respect to the exercise of the corporate functions. Debts contracted by municipalities, by authority of the Legislature, are contracted by them as principals and not as agents of the state." (Italics ours.)

As the County of New York was vested with "governmental and political powers and duties," to be exercised on behalf of the State, the fact that the State was held to have lacked sufficient interest in the proceeds of the county bonds misappropriated to enable it to recover them for the county, forcibly illustrates the great difference in the nature of the power and duties of a municipality as an agency of the State, on the one hand, and on the other, as a representative and trustee of the property rights of its citizens.

In the case of *South Carolina v. The United States* (199 U. S., 437), it was held that when the State of South Carolina adopted a dispensary system to control the sale of liquor, the State appropriating the profits, one-half being divided equally between the municipality and the county in which the dispensaries were located and the other half paid into the State treasury, the State was engaged in "ordinary private business," which was not, by reason of the fact that it was conducted by the State, exempted from national taxation.

After citing many cases showing that the income of the State or municipality in its ordinary governmental capacity could not be taxed, MR. JUSTICE BREWER, writing for this Court, says that the principle (p. 461):

> "does *not extend* to those" (state agencies) which are used by the State in the carrying on of *an ordinary private business.* • • •
>
> "The Supreme Court of Massachusetts, speaking by Mr. Justice Gray (afterwards an Associate Justice of this Court), in Oliver v. Worcester (102 Mass., 489, 499, 500), observed: 'The distinction is well established 'between the responsibility of towns and cities 'for acts done in their public capacity, in the

'discharge of *duties imposed upon them* by 'the legislature for the public benefit, and 'for acts done in what may be called their 'private character, in the management of 'property or rights *voluntarily held by them* 'for their own immediate profit or advan-'tage as a corporation, although inuring, of 'course, ultimately to the benefit of the pub-'lic.'" (Italics ours.)

Many cases are cited illustrating the different rights and duties attaching to a municipality in its capacity as a private corporation, as distinguished from those in its capacity as a governmental agency, among them being:

Brown v. Vinalhaven, 65 Maine, 402;
Mead v. City of New Haven, 40 Connecticut, 72;
City of Petersburg v. Applegarth's Administrator, 28 Gratt., 321, 343;
Eastman v. Meredith, 36 N. H., 285;
Western Saving Fund Society v. City of Philadelphia, 31 Pa. St., 175.

He (at page 462) quotes with approval the opinion in the last case (p. 183), as follows:

"Such contracts are not made by the municipal corporation, by virtue of its powers of local sovereignty, but in its capacity of a private corporation. The supply of gaslight is no more a duty of sovereignty than the supply of water. Both these objects may be accomplished through the agency of individuals or private corporations, and in very many instances they are accomplished by those means. If this power is granted to a borough or a city, it is a special *private franchise*, made as well for the private emolument and advantage of the city as for the public good. The whole investment is the

private property of the city, as much so as the lands and houses belonging to it. Blending the two powers in one grant, does not destroy the clear and well-settled distinction, and the process of separation is not rendered impossible by the confusion. In separating them, regard must be had to the object of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character. But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation *quoad hoc* is to be regarded as a private company. *It stands on the same footing as would any individual or body of persons, upon whom the like special franchises had been conferred.*" (Italics ours.)

In *People v. Fields*, 58 N. Y., 491, the Comptroller of The City of New York, who had been authorized by statute to order, adjust and pay claims, not to exceed the sum of $50,000, of members of certain companies of firemen, had audited, adjusted and paid claims of firemen of the companies specified, aggregating an amount in excess of $50,000. The defendant, as attorney for the claimants, received the monies so paid and the State brought action against him to recover the amounts in excess of $50,000, so paid.

The court held that the State had no cause of action, although the defendant was concededly liable in an action by the city to recover the excess amount so paid, and the city had refused to sue for the same, basing its decision upon the ground that the state had no interest whatever in the funds of the city, which had been so misappropriated.

The court bases its decision upon *People v. In-*

gersoll, 58 N. Y., 1, heretofore referred to at page 30 of this brief:

The Court says (pages 508 et seq.):

> "We think that the question thus is fairly raised in the case, whether if a municipality has a right of action for its money wrongfully received from its treasurer and refuses to prosecute for a recovery, the state may, in its character of *parens patriae* bring action nominally for itself, but really in behalf of the individuals or bodies of citizens, who are presently or ultimately to be affected by the wrongful payment and misapplication. * * * The money of a municipal corporation has been illegally paid by its officers, and illegally received by the appellant. The municipality and its officers refuse to sue for a recovery thereof. * * *
>
> "Most certainly the fraud and collusion of the city officials alleged, could not and did not deprive the City of New York of its property rights, or confer title to the money in dispute on the state. Such an idea would be preposterous, and is not put forth by any one." * * *
>
> "The averment of collusion or neglect to prosecute does not give vitality to the authority, nor is it necessary to put the attorney general in motion. In other words, it has no materiality. * * * The case is not distinguishable by any material circumstances from The People v. Ingersoll and must be judged accordingly."

To the same effect see *Board of Supervisors v. Ellis*, 59 N. Y., 620, where the court sustained a recovery by the county of money of the county paid out on an illegal audit; and *The Village of Fort Edward v. Fish*, 159 N. Y., 363, where the court sustained a recovery by the village of money illegally paid by its board of water commissioners.

As the case of *Atkin v. Kansas,* 191 U. S., 207, is the one most often cited and relied on to justify statutory control by the legislature of municipal action, on the ground that a municipality is a mere political agency, we wish to point out the fact that that doctrine as applied to the facts of that case does not in any way conflict with the position of the plaintiff-in-error herein, as an analysis of the case will show.

It is in an authority for the proposition that the city in its private or proprietary capacity is not entitled to the enjoyment of the constitutional guaranties against the impairment of contract obligations and the taking of property without due process of law. (See *Hunter v. City of Pittsburgh,* 207 U. S., 111, cited at page 41 of this brief.)

In the *Atkin* case the question decided was as to the constitutionality of a statute of the State of Kansas which provided for an eight hour day for and the payment of the prevailing rate of wages, to employees of the State, and of the municipal corporations within it, and employees of those contracting with the state or any of such corporations, and imposed a penalty of fine or imprisonment or both, for a violation of its provisions.

The defendant in that case entered into a contract with Kansas City to construct a brick pavement on one of its boulevards. He employed laborers for more than eight hours per day. He was prosecuted, convicted and fined. On writ of error to the Supreme Court of Kansas his case was taken to the Supreme Court of the United States. It will be noted here that no question of forfeiture of contract could or did arise, nor did the question of discrimination against aliens or citizens of other states. The state court of Kansas found and decided that the statute was not

in conflict *with any provision of the State Constitution,* or any *right* of the City of Kansas conferred upon it by the State Constitution. It was conceded, as stated by this Court, that (page 221):

> "The improvement of the Boulevard in question was a work of which the State, if it had deemed it proper to do so, could have taken immediate charge by its own agents; for it is one of the functions of government to provide public highways for the convenience and comfort of the people. Instead of undertaking that work directly, the State invested one of its governmental agencies with power to care for it. Whether done by the State directly or by one of its instrumentalities, the work was of a public, not private character."

Mr. Justice Harlan states (page 224):

> "We rest our decision upon the broad ground that the work being of a public character, absolutely under the control of the State and its municipal agents, acting by its authority, it is for the State to prescribe the conditions under which it will permit work of that kind to be done. Its action touching such a matter is final so long as it does not by its regulations infringe the personal rights of others, and that has not been done."

That the court did not intend that its language or decision should apply, except to the case in hand is indicated by its statement that it was subject "to the fundamental condition that the "collective and individual rights of the people "of the municipality shall not thereby be de-"stroyed."

This is further convincingly shown by a reference to the cases which the court cites to sustain the proposition it enunciates. For instance,

in *City of Clinton v. Cedar Rapids & Missouri R. R. Co.* (24 Iowa, 455, 475) where the Iowa court does refer to the practically unlimited power of the legislature in dealing with municipalities, it is yet careful to add:

> "Unless there is some *constitutional limitation* on the right, the legislature might, by a single act, if we can suppose it capable of so great a folly and so great a wrong, sweep from existence all the municipal corporations of the State, and the corporations could not prevent it. * * * They are, so to phrase it, the mere tenants at will of the legislature."

This language was used to define the powers of the legislature in dealing with the city in its capacity as a governmental agent.

The same is true of the case of *Rogers v. Burlington*, 3 Wall, 654, also cited.

In the case of *United States v. Railroad Company* (17 Wall., 322), the court recognizes clear limitations on the power of the Legislature in dealing with the corporate rights and powers of cities. The question at issue was whether the income derived by the city from bonds authorized by the Legislature to be issued to assist in the construction of a railroad and secured by the railroad, was taxable under a statute by the United States, or whether such income was for municipal purposes and exempt from taxation. The court finding that it was strictly municipal income, held it was non-taxable, but in its opinion (p. 332) clearly points out the distinction between the rights and powers of the city in its governmental as distinguished from its private capacity. It is said:

> "We admit the proposition of the counsel

> that the revenue must be municipal in its nature to entitle it to the exemption claimed. Thus if an individual should make the city his agent and trustee to receive funds and distribute them in the aid of science, literature, or the fine arts, or even for the relief of the destitute and infirm, it is quite possible that such revenue would be subject to taxation. The *corporation* would therein depart from its municipal character and assume the position of a private trustee. It would occupy a place which an *individual could occupy with equal propriety.* It would not in that action be an *auxiliary or servant of the State* but of the individual creating the trust. There is nothing of a governmental character in such a position." (Italics ours.)

Surely in owning and leasing or operating railroads for the convenience of its citizens the city is occupying a "place which an individual could occupy with equal propriety." Indeed, the history of rapid transit shows that the earlier acts providing for rapid transit were special acts conferring special charters or franchises on individuals and corporations. Later they conferred the same right upon the city, with power to sell the franchise. Later still, they gave the city power to construct subject to approval upon referendum by the people, and still later, power to construct, equip and operate or either, without such referendum.

(See particularly *Matter of Rapid Transit Railroad Commissioners,* 197 N. Y., 81, referred to at page 25 of this brief.)

In *Mt. Pleasant v. Beckwith,* 100 U. S., 514, speaking of the authority of the Legislature over municipalities, this court, it is true, says (p. 524):

"Counties, cities and towns are munici-

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pal corporations created by the authority of the Legislature, and they derived all their powers from the source of their creation, except where the constitution of the State otherwise provides."

But it further says (p. 529):

"Municipal corporations, says MR. JUSTICE FIELDS, so far as they are invested with subordinate legislative powers for local purposes, are mere instrumentalities of the State for the convenient administration of their affairs; but when authorized to take stock in a railroad company and issue their obligations in payment of the stock, *they are to that extent to be deemed private corporations, and their obligations are secured by all the guaranties which protect the engagements of private individuals.* (*Broughton v. Pensacola*, 93 U. S., 266, 269)." (Italics ours.)

In *Hill v. Memphis* (134 U. S., 198), bonds issued to a railroad company in payment for its stock, pursuant to a statute passed by the General Assembly, were held to be void and the legislature without power under the constitution to confer such authority on the city.

Barnett v. Denison (145 U. S., 135) holds nothing to the contrary of the other cases cited, but is in entire harmony with them.

In *Williams v. Eggelston* (170 U. S., 304), in considering the question as to whether a municipal corporation in the exercise of its governmental functions has any powers which the Federal constitution protects against impairment by the State Legislature, the court said simply (p. 310):

"A municipal corporation is, *so far as its purely municipal relations are concerned*, an agency of the State for conducting the

affairs of government, and *as such*, it is subject to the control of the legislature. * * * Whatever may have been the practice of the State in the past, it cannot be doubted that the power of the legislature over all local municipal corporations is unlimited, *save by the restrictions of the State and Federal constitutions.*" (Italics ours.)

The rule is well stated in *Benson v. Mayor*, 10

> "The inhabitants of the City of New York have a vested right in the city hall, markets, water works, ferries, and other public property, which cannot be taken from them, any more than their individual dwellings or store houses. Their rights, in this respect, rest not merely upon the constitution, but upon the great principles of Eternal Justice which lie at the foundation of all free governments."

In *Hunter v. The City of Pittsburgh*, 207 U. S., 161, this court, although holding that a statute of Pennsylvania, consolidating the cities of Pittsburgh and Allegheny, was not repugnant to the constitution of the United States, as depriving the said cities or their citizens or taxpayers of property without due process of law, or as impairing the obligation in a contract between the city and its citizens and taxpayers, clearly recognizes the distinction between the proprietary or private and the governmental or public functions of municipal corporations.

Mr. Justice Moody, in delivering the opinion of the court, says (page 179):

> "It will be observed that *in describing the absolute power of the state over the property of municipal corporations we have not extended it beyond the property held and used*

for governmental purposes. Such corporations are sometimes authorized to hold, and do hold, property for the same purposes that property is held by private corporations or individuals. The distinction between property owned by municipal corporations in their public and governmental capacity and that owned by them in their private capacity, though difficult to define, has been approved by many of the state courts (1 Dillon *Municipal Corporations,* 4th Ed., section 66 to 66-A, inclusive, and cases cited in Note to 48 L. R. A. 465), and it has been held that as to the latter class of property the legislature is not omnipotent. If the distinction is recognized it suggests the question whether property of a municipal corporation owned in its private and proprietary capacity may be taken from it against its will and without compensation. Mr. Dillon says truly that the question has never arisen directly for adjudication in this court. But it and the distinction upon which it is based has several times been noticed. (*Commissioners v. Lucas,* 93 U. S., 108, 115; *Meriwether v. Garret,* 102 U. S., 472, 518, 530; *Essex Board v. Skinkle,* 140 U. S., 334, 342; *New Orleans v. Water Works Company,* 142 U. S., 79, 91; *Covington v. Kentucky,* 173 U. S., 231, 240; *Worcester v. Street Railway Co.,* 196 U. S., 539, 551; *Monterey v. Jacks,* 203 U. S., 360.)"

In *New Orleans v .New Orleans Water Works Company,* 142 U. S. 79, the Supreme Court of the State of Louisiana had denied to the plaintiffs-in-error, the City of New Orleans and certain tax payers of that city an injunction against the city from making any appropriation under a contract between the City and the defendant-in-error, for the supply of water to the city at a price to be fixed by the number of fire plugs, fire hydrants, and fire wells, connected with the mains and pumps of the defendant-in-error.

The action had been originally instituted by taxpayers against the defendant-in-error and the city and in the course of the litigation the city united in the taxpayers' prayer for relief.

The Water Works Company had been incorporated under an act of the Legislature passed in 1877 which authorized it to furnish water to the city and its inhabitants and provided that the city should be allowed to use all water for municipal purposes free of charge, "and in consideration thereof the franchises and property of the company should be exempt from taxation."

In 1878 the legislature passed an act rendering the company liable to pay taxes and "the act was accepted by the city, by the Water Works Company and by all others interested." In 1881 the city brought suit against the Water Works Company for taxes assessed against the property of the company aggregating $11,484.87 and the Water Works Company counterclaimed for the value of the water it furnished the city. In the lower court the city recovered judgment for $11,484.87, the taxes claimed by it, and the Water Works Company recovered judgment for $40,-281.87, the value of the water supplied by it to the city, but on appeal to the Supreme Court of the State, while the judgment in favor of the city was affirmed, the judgment in favor of the company was reduced to $11,484.87, the exact amount of the taxes for which judgment was granted to the city, that court holding that the amount recoverable from the city by the company was limited to the amount of the taxes and determinable thereby.

In 1894 the company procured the passage of an act by the legislature which required the city to pay the Water Works Company the value of all water supplied during any year for which taxes

were levied against the company for municipal purposes, and authorized the city to enter into a contract fixing the price at which such water should be supplied. The contract above referred to was accordingly entered into, but the taxpayers, plaintiffs-in-error, sought to enjoin the city from carrying out its terms.

The plaintiffs-in-error asserted that there were two federal questions before this court:

1. Whether or not the Act of 1884 requiring The City to pay for the water supplied by the Water Works Company, and authorizing the City to enter into an agreement with the Water Works fixing the price of such water, impaired an obligation of the contract "contained in section 11 of the Act of 1877 which provided that the city should be allowed the free use of water for municipal purposes, in consideration whereof the franchise and property of the Water Works Company should be exempted from taxation."

2. Whether or not the Act of 1884 deprived the City of its property, without due process of law, in that it "destroyed the right the City had or possessed under the Act of 1877, to pay for the water supplied in taxes."

This Court held against the plaintiffs-in-error, and dismissed the writ.

On the question as to whether or not a contract obligation had been impaired, the Court says (at page 89):

> "There are several reasons, however, why the city cannot claim that this contract was impaired by subsequent legislation: First, because the contract itself, which was in reality between the state and the Water Works Company, was *ultra vires* and void, and was

so declared by the Supreme Court of Louisiana in the case between the city and the Water Works Company, 36 La. Ann., 432; second, because the city repudiated its contract by bringing suit against the company for its taxes; and it does not now lie in the mouth of its counsel to claim that the obligation of such contract was impaired by subsequent legislation, when such legislation was rendered necessary by, or at least was the natural outgrowth of, its own repudiation of the contract; third, the city being a municipal corporation and the creature of the state legislature, does not stand in a position to claim the benefit of the constitutional provision in question, since its charter can be amended, changed or even abolished at the will of the legislature."

On the question as to whether or not the city had been deprived of its property without due process of law, this court finds as follows (at page 92):

"The only property of which it was deprived was the right it has possessed under the act of 1877 of paying for its water supply in taxes; but if this were property at all, even within the liberal definition of that word given by MR. JUSTICE BRADLEY in *Campbell v. Holt*, 115 U. S., 620, 630, it was not such a vested right as was beyond the control of the legislature. An adjudication of the rights of two private parties to a contract, with respect to the terms of such contract, does not prevent their agreeing upon other and different terms for the future. The fact that such parties are a private and a public corporation is immaterial, so long as the right to contract exists."

While basing its decision in part upon a recognition of the principle that a municipality in the exercise of governmental functions is a mere

agent of the state, this court clearly recognizes that the private and proprietary rights and interests of a city are as immune from legislative interference as similar rights of individuals. It says (at page 91):

> "The municipality, being a mere agent of the state, stands, *in its governmental or public character,* in no contract relation with its sovereign, at whose pleasure its charter may be amended, changed or revoked, without the impairment of any constitutional obligation, while *with respect to its private or proprietary rights and interests it may be entitled to the constitutional protection.* In this case the city has no more right to claim an immunity for its contract with the Water Works Company, than it would have had if such contract had been made directly with the state. The state having authorized such contract, might revoke or modify it at its pleasure." (Italics ours.)

In the case of *Loan Association v. Topeka* (20 Wall. U. S., 654), in passing upon the validity of a statute authorizing Topeka to issue its bonds to aid in establishing a private manufacturing enterprise, which it deemed to be of great benefit to the city, the Court held that it was beyond the power of the legislature and violative of the following section of the constitution of the State of Kansas:

> "SECTION 5. Provision shall be made by general law for the organization of cities, towns and villages; and their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, shall be so restricted as to prevent the abusing of such power."

This certainly gave the legislature rather broad powers in regard to rights it might confer

upon cities to issue and loan their credit, yet the Court, while conceding that the broadest power should be allowed to the State as regards taxation and the purposes thereof, nevertheless holds that there are limits beyond which its exercise would be an "unauthorized invasion of private rights." It says (page 662):

> "It must be conceded that there are such rights in every free government beyond the control of the State. * * *
>
> "The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislature and the judicial branches of these governments are all of limited and defined powers.

And at page 663:

> "There are limitations on such powers which *grow out of the essential nature of all free governments,* implied reservations of *individuals' rights,* without which the social compact could not exist, and which are respected by all governments, entitled to the name." (Italics ours.)

Assuredly, the "individual rights" of the citizens of New York of which the city is trustee, are so interwoven and bound up with the rapid transit system as to be "beyond the control of the State," within the principles cited in the *Topeka* case.

There are certain things which it is not competent for State legislatures to do by enactment, even if there should be found in the constitution of a State or of the United States *no special restrictions on their power.*

> *Calder v. Bull,* 3 Dall., 386.
> *Wilkinson v. Leland,* 2 Peters, 627;

Smith v. Alabama, 124 U. S., 465;
State v. Moores, 55 Neb., 480;
Bradshaw v. Rogers, 20 Johns., 102;
Rathbone v. Wirth, 150 N. Y., 459;
Camp v. Rodgers, 44 Conn., 291;
Bonhams Case, 8 Coke., 114a;
London v. Woods, 12 Modern, 669.

In *Calder v. Bull,* 3 Dallas, 385, the legislature of Connecticut had passed a law setting aside a decree of a probate court which refused record to the will of one Morrison, and granted a new hearing. A new hearing was had and the will was admitted to probate.

At the time the statute was passed the proponents of the will had lost their right to appeal from the decree refusing to admit the will to probate, and there was no law whereby a new hearing or trial might be obtained.

The plaintiff-in-error, heir at law, but not a devisee under the will, attacked the constitutionality of the act, on the ground that it was *ex post facto.*

This court held to the contrary, "because, first, if the act of the legislature of Connecticut was a judiciary act, it is not within the words of the constitution; and, second, even if it was a legislative act, it is not within the meaning of the prohibition."

Mr. Justice Chase, says (p. 387):

> "I cannot subscribe to the omnipotence of a state legislature, or that it is absolute and without control; although its authority should not be expressly restrained by the constitution, or fundamental law of the state. * * * *The purposes for which men enter into society* will determine the *nature and terms* of the *social compact;* and

as they are the *foundation* of the legislative power, they will decide what are the prcper *objects* of it. The *nature* and *ends* of legislative power will *limit the exercise of it.* * * * There are acts which the *federal* or *state* legislature cannot do without exceeding their authority. There are certain vital principles in our free republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for *personal liberty,* or *private property,* for the protection whereof *the government was established.* An act of the legislature (for I cannot call it a law), contrary to the great principles of the *social compact,* cannot be considered a rightful exercise of legislative authority. The obligation of a law, in governments established on *express compact,* and on *republican principles,* must be determined by the nature of the power on which it is founded. * * *

"The genius, the nature and the spirit of our state governments, amount to a prohibition of such acts of legislation" (acts impairing contracts and property rights, etc., mentioned); "and the general principles of law and reason forbid them. The legislature may (not) * * * violate the right of an antecedent lawful private contract; or *the right of private property.* To maintain that our federal, or state legislature possesses such powers, *if they had not been expressly restrained,* would, in my opinion, be a political heresy, altogether inadmissible in our free republican governments." (Italics ours.)

In *Wilkinson v. Leland,* 2 Peters, 627, MR. JUSTICE STORY says (page 657):

"That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legis-

> lative body, without any restraint. The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred. At least, no court of justice in this country would be warranted in assuming that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well-being, without very strong and direct expressions of such an intention."

The opinion also refers to a previous decision of this court, *Terrett v. Taylor*, 9 Cranch., 43 in which it was held that a grant of title to lands, once made by the legislature, is irrevocable and—

> "That a different doctrine is utterly inconsistent with the great and fundamental principle of a republican government, and with the right of citizens to the free enjoyment of their property lawfully acquired."

The opinion in the *Terrett* case is also by Mr. Justice Story. He says at page 52:

> "That the legislature can repeal statutes creating private corporations, or confirming to them property already acquired under the faith of previous laws, and by such repeal, can vest the property of such corporations exclusively in the state, or dispose of the same to such purposes as they may please, without the consent or default of the corporators, we are not prepared to admit; and we think *ourselves standing upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and the letter of the constitution of the United*

States, and upon the decisions of most respectable judicial tribunals, in resisting such a doctrine." (Italics ours.)

In *Smith v. Alabama,* 124 U. S., 465, Mr. Justice MATTHEWS says:

> "There is no common law of the United States, in the sense of a national customary law, distinct from the common law of England as adopted by the several states each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes. (*Wheaton v. Peters,* 8 Pet., 591). A determination in a given case of what that law is may be different in a court of the United States from that which prevails in the judicial tribunals of a particular state. * * *
>
> "There is, however, one clear exception to the statement that there is no national common law. The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history. The code of constitutional and statutory construction which, therefore, is gradually formed by the judgments of this court, in the application of the constitution and the laws and treaties made in pursuance thereof, has for its basis so much of the common law as may be implied in the subject, and constitutes a common law resting on national authority. (*Moore v. United States,* 91 U. S., 270.)"

In *State v. Moores,* 55 Neb., 480, it was held that a city or town has the right to maintain its own police and fire departments without legislative interference. In an exhaustive opinion, reviewing many authorities and laying particular stress upon the case of *Rathbone v. Wirth,* 6 App.

Div., 277; 150 N. Y., 459, the court lays down the proposition that

> "to justify the courts in declaring a statute invalid, it is not essential that it should contravene some express provision of the constitution. If the act is inhibited by the general scope and purpose of the fundamental law, it is as invalid as though forbidden by the letter of that instrument."

And says at page 489:

> "The inhibition on the power of the legislature may be by implication as well as by expression. Laws may be, and have been, declared invalid although not repugnant to any express restriction contained in the fundamental law."

And at page 505:

> "Some things are too plain to be written. If this charter of state government, which we call a constitution, were all there was of constitutional command; if the usages, the customs, the maxims, that have sprung from the habits of life, modes of thought, methods of trying facts by the neighborhood, the mutual responsibility in neighborhood interests, the precepts which have come from the revolutions which overturned tyrannies, the sentiments of manly independence and self-control which impelled our ancestors to summon the local communities to redress local evils, instead of relying upon king or legislature at a distance to do so,—if a recognition of all these were to be stricken from the body of our constitutional law, a lifeless skeleton might remain, but the living spirit, that which gives it force and attraction, which makes it valuable and draws to it the affections of the people, that which distinguishes it from the numberless constitutions, so called, which in Europe have been set up and thrown down within the last hundred years, many of which, in their expressions,

> have seemed equally fair and to possess equal promise with ours, and have only been wanting in the support and vitality which these alone can give—this living and breathing spirit, which supplies the interpretation of the words of the written charter, would be utterly lost and gone. * * *"

In *Bradshaw v. Rodgers*, 20 Johnson, 102, the defendants in an action for trespass admitted the entering and sought to defend the same, upon the ground, that they had a contract with the Canal Commissioners to make a turnpike road in lieu of a portion of a turnpike road which had been taken for canal purposes.

SPENCER, C. J., in reversing the judgment for the defendant, took the ground that it was against natural justice to permit the State's occupation or use of private land without making compensation; and reached his determination without regard to constitutional provisions, recognizing that that the Fifth Amendment was intended only as a restraint upon the national government, and that the later amendments to the state constitution were not, at the time of his decision, operative. He says (pages 105-106):

> "The act under consideration contains no provision to compensate, at any time, those whose lands may be taken as a substitute for a public road or highway, altered or discontinued by the principal engineer, for the damages they sustain. This is directly opposed to the fifth article of the amendments of the constitution of the United States, which forbids the taking of private property for public use, without just compensation. The same inhibition to the power of the legislature, is contained in the late amendments to the constitution of this state. I do not rely on either, as having a binding constitutional force upon the act under consideration.

> The former related to the powers of the national government, and was intended as a restraint on that government; and the latter is not yet operative. *But they are both declaratory of a great and fundamental principle of government; and any law violating that principle must be deemed a nullity, as it is against natural right and justice.*"

In *Rathbone v. Wirth*, 150 New York, 459, O'BRIEN, J. says (page 483):

> "When the validity of such legislation is brought in question it is not necessary to show that it falls appropriately within some express written prohibition contained in the constitution. The implied restraints of the constitution upon legislative power may be as effectual for its condemnation as the written words, and such restraints may be found either in the language employed, or in the evident purpose which was in view and the circumstances and historical events which led to the enactment of the particular provision as a part of the organic law."

In *People v. Warden*, 154 App. Div., 413, CLARKE, J., says (page 421):

> "The provisions of the Bill of Rights, in this state are embodied in the statutes, to wit, the Civil Rights Law * * * and not in the constitution. Nevertheless, we fully recognize the proposition that the rights enumerated in the Bill of Rights were not created by such declaration. They are of such character as necessarily pertains to free men in a free state."

In *Camp v. Rogers*, 44 Conn., 291, the question was raised as to the constitutionality of a statute which provided that the driver of a vehicle should be liable in treble damages for an injury sustained by another, because of the failure of

the driver to keep to the right of the road, and, in the event of the inability of the individual injured to collect his judgment from the driver, that the owner of the vehicle which had been driven on the wrong side of the road, should be liable for the amount recovered.

The Court, while construing the word "owner" in the statute to mean: "the person in control of the vehicle either mediately or immediately" and thus excluding from the provisions of the statute the owner of a vehicle which was driven by one other than his servant, concedes that the statute, if given a literal interpretation, would be invalid,

> "either as manifestly against natural justice or violating that article of the constitution which forbids the taking away of any person's property 'without due process of law.'"

Although the English Parliament is unrestrained by a constitution, it is recognized that even an act of that body, contrary to principles of natural justice and fundamental law, would be void.

Bonham's Case, 8 Coke, 114-a;
London v. Woods, 12 Modern, 669.

In *London v. Woods, supra,* (decided in 1701) Lord Holt, in discussing the validity of a by-law of the City of London which authorized an action to be brought against the sheriff, for breach of his official duty, in any court of record of the City of London, and in holding that such a by-law did not authorize the Mayor of the City of London to institute an action in his own court because natural justice forbade that the same individual should be judge and party, takes occasion to approve the doctrine laid down by Lord Coke in *Bonham's case, supra.* He says (page 687):

> "And what my Lord Coke says in Dr. Bonham's case is far from any extravagancy, for it is a very reasonable and true saying, that if the Act of Parliament should ordain that the same person should be party and judge, or which is the same thing, judge in his own cause, it would be a void act of Parliament, for it is impossible that one should be judge and party; for the judge is to determine between party and party, or between the government and a party and an act of Parliament can do no wrong, though it may do several things that look pretty odd."

We take it that any act of the legislature which would shock the public conscience or involve, or imply, governmental perfidy, would come within the meaning of what the courts say is prohibited, or may not legally be done under the principles of the "social compact," although not expressly prohibited by either the State or Federal Constitution.

It may be said that these are extreme cases. But extreme cases are not only legitimate, but are the final and best, tests of the constitutionality of legislative acts.

We can think of no act more within the reason and principles of the implied prohibition, thus recognized, than the enforcement of laws, or a policy, which will destroy, or hamper the City of New York in the exercise and enjoyment of the rights guaranteed to it under its ancient charters, or in the completion or extension of rights authorized by act of the legislature, either for the public convenience of its citizens or to increase its own revenue. Whether such results flow from a direct act of legislation or result indirectly from statutory requirements which, if enforced, would be prohibitive of their realization or enjoyment, can make no difference.

See also

Allen v. The Inhabitants of Jay (60 Maine, 124), and *Lowell v. The City of Boston* (111 Mass., 454) as showing the limited extent to which the legislature of a state may authorize or interfere with the rights of the citizens of a municipality in regard to the things which the city owns, controls or has to do with in its corporate capacity.

The result of a review of the authorities, as well as the history and functions of municipalities in our State government, clearly demonstrate that they not only possess many and broad powers in their corporate capacities, conferred by the state constitutions, and rights the exercise of which the legislature may not destroy or impair, but that, *outside of and in addition to* such rights and the powers expressly conferred, they possess other powers and rights which have been the out-growth of the exercise by them of private or corporate functions from the earliest times and have been so universally recognized, and become so firmly embedded in policy and practice, that they may no more be interfered with by the legislature than those of express constitutional origin. This is proved by their unchallenged exercise of such powers and rights both in this country and in England, prior to the adoption of our state and federal constitutions and by the fact that our courts, both state and federal, have recognized and protected them as against hostile and destructive legislation in states whose constitutions contain no provisions defining and securing them.

They are so interwoven with the rights of the individual that to destroy them would necessarily impair individual rights protected by express constitutional guarantee. This latter class of

rights are doubtless what the Court had in mind in the *Atkin* case (*supra*) when it said that the legislative power was "subject only to the fundamental condition that the collective and individual rights of the people of the municipality shall not thereby be destroyed"; and again in the *Topeka* case (*supra*), when it says: "There are limitations on such powers" (*legislative powers*) "*which grow out of the essential nature of all free governments. Implied* reservations of *individual rights* without which the *social compact could not exist* and which are respected by all governments entitled to the name," and when it further says legislative interference with them would be an "unauthorized invasion of private rights; and when it is said, in the *Calder* case, (*supra*), "the nature and end of legislative power will limit the exercise of it, * * * " and that they are protected by the "social compact" and that "our federal or state legislatures" may not interfere with them, even where "they had not been expressly restrained." (Italics ours.)

3. HAVING ESTABLISHED THE FACT THAT THE CITY IS POSSESSED OF LEGAL CORPORATE RIGHTS, ENTITLED TO THE SAME CONSTITUTIONAL PROTECTION AS THE RIGHTS OF INDIVIDUALS, WE SHALL NOW PROCEED TO SHOW THAT UNDER THE PRINCIPLES RECOGNIZED AND ESTABLISHED BY THIS COURT AND THE COURTS OF MANY STATES, THE PROVISIONS OF SECTION 14 OF THE LABOR LAW, PROHIBITING THE EMPLOYMENT OF ALIENS AND GIVING PREFERENCE TO CITIZENS OF NEW YORK STATE IN THE CONSTRUCTION OF THE SUBWAY OR UPON OTHER MUNICIPAL CONTRACTS, ARE PLAINLY IN VIOLATION OF THE PROVISIONS OF THE UNITED STATES CONSTITUTION ABOVE REFERRED TO, BOTH AS REGARDS THE RIGHTS OF THE MUNICIPALITY, AND THOSE OF INDIVIDUALS, ESPE-

CIALLY TAXPAYERS OF THE CITY, CITIZENS OF OTHER STATES AND ALIENS RESIDING IN SAID STATE, AS WELL AS CONTRACTORS WITH THE CITY.

That section of the Labor Law, under which defendants claim the power and right to terminate the contracts in question, by reason of the contractor's employment of alien labor, or because of failure to give preference to citizens of the State of New York in the employment of labor, we quote in full at page 2 of this brief:

In order to clearly present the conflict claimed between the provisions of the section quoted and the provisions of the Constitution referred to, as well as the bearing of the decisions of the courts upon it, we give the following brief history of labor legislation in the State of New York.

The first statute in that State designed to regulate labor or prescribe conditions with regard to employment seems to be Chapter 856 of the Laws of 1867. It provides for an eight hour day, between the rising and the setting of the sun, where there is no contract to the contrary, excepting, however, from its provisions, farm labor and service by the year, month or week.

This statute is expressly repealed by Section 6 of Chapter 385 of the laws of 1870. The 1870 statute determines that eight hours shall constitute a legal day's work for "mechanics, workingmen and laborers excepting those engaged in farm and domestic labor" but permits of overtime for an extra compensation. The act is intended to apply only to state and municipal employees and the employees of persons contracting with the state or a municipal corporation for performance of public works. It provides for the removal of an officer of the state or city who countenances a violation of the act and provides for a forfeiture of all rights under his contract

by a contractor on public works, who has violated the provisions of the statute.

Chapter 380 of the laws of 1889 prescribes that "in all cases where laborers are employed on any public works in this state preference shall be given to citizens of the State of New York." This is the first appearance in the statutes of any reference to citizens. Chapter 622 of the Laws of 1894 contains an amendment to Chapter 385 of the Laws of 1870 above referred to.

As amended the previous statute is made to read:

> "This act shall apply to all mechanics, workingmen and laborers now or hereafter employed by the State or any municipal corporation therein, through its agents or officers, or in the employ of persons contracting with the State or such corporation for performance of public works. And all such mechanics, workingmen and laborers so employed shall receive not less than the prevailing rate of wages in the respective trades or callings in which such mechanics, workingmen and laborers are employed in said locality. And in all such employment, none but citizens of the United States shall be employed by the State, any municipal corporation therein, and by persons contracting with the state or municipal corporation thereof, and every contract hereafter made by the state or any municipal corporation for the performance of public works must comply with the requirements of this section."

The effect of this statute is to amend, without expressly so stating, Chapter 380 of the Laws of 1889, which originated the preference to citizens of the State of New York on public works.

Chapter 415 of the Laws of 1897 in effect consolidated Chapter 380 of the Laws of 1889 and Chapter 622 of the Laws of 1894. It provides in

Section 13 for the employment of none but citizens on public works of the state or of a municipality, and for a preference among laborers to citizens of the State of New York, and the insertion in each contract for the construction of a public work of a provision to the effect that if the requirements of the sections are not complied with the contract shall be void. Except for the provision in what is now Section 14 of the Labor Law requiring the keeping of lists of employees, etc., Section 13 of this statute of 1897 is in exactly the same form as Section 14 of the Labor Law.

The learned Appellate Division in the case at bar, by unanimous decision, held that the provisions of Section 14 of the Labor Law were in conflict with the foregoing provisions of the United States Constitution, and hence void. The opinion on this point, written by SCOTT, J., of that court, and the opinion on the same point by COLLIN, J., of the Court of Appeals, so thoroughly discuss the fundamental principles and authorities applicable that quotation from them would hardly do them justice. We, therefore, direct the Court's attention to them (Record, pp. 75 and 104) without further discussion of them here.

The opinions written by CARDOZO, J., BARTLETT, C. J., and SEABURY, J., of the Court of Appeals, are to the contrary. We shall attempt to show with all due respect, that they are based on erroneous conceptions of the real issues involved and lack support in principle and in authority. (See III, *infra.*)

FEDERAL DECISIONS.

As was said in the case of *Insurance Company v. Morse* (20 Wall., at page 456), speaking of apparent conflicts between different cases:

> "In each of these cases, the general language of the learned justice is to be expounded with reference to the subject before him. They lay down principles in general terms, which are to be understood only with reference to the facts in hand."

Applying that rule to the general language of the various cases where there is a seeming conflict in regard to the construction and effect of labor laws, and limiting the language used in each case to the facts before the court, the decision actually made will show, we are satisfied, that there is little, if any, real conflict between decisions upon the subject, and none upon the fundamental or controlling principles in which the judgment of the Appellate Division finds ample support.

As we have seen, "a corporation has the same "right to the protection of the laws as an in- "dividual citizen, and the same right to appeal "to all the courts of the country. The rights "of an individual are not superior in this re- "spect to that of a corporation." And that while States may regulate their own corporations and the affairs of their citizens, such regulation must be "in subordination, however, to the Con- "stitution of the United States."

Insurance Co. v. Morse, 20 Wallace, 455.

As we have also pointed out, the New York Court of Appeals has held that "the city owns "the subway and it is a railroad corporation, so "far as the construction, operation and leasing "thereof is concerned."

Matter of Rapid Transit Commissioners, 197 N. Y., 81.

The principles that should guide courts in interpreting and giving force to constitutional provisions are well stated in the case of *Gulf, Colorado and Santa Fe Railroad v. Ellis* (165 U. S., 150). At page 159 it is said:

> "The first official action of this nation declared the foundation of government in these words:
>
> 'We hold these truths to be self-evident, 'that all men are created equal, that they 'are endowed by their Creator with cer- 'tain unalienable rights; that among these 'are life, liberty and the pursuit of hap- 'piness.'
>
> "While such declaration of principles may not have the force of organic law or be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the *body* and the *letter* of which the former is the *thought* and the *spirit* and it is always safe to read the *letter* of the Constitution in the *spirit* of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government." (Italics ours.)

Again, the same court, referring to the *Yick Wo* case, says (p. 159):

> "No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speaking for this court, in *Yick Wo v. Hopkins* (118 U. S., 356, 369):
>
> 'When we consider the nature and the 'theory of our institutions of government, 'the principles upon which they are sup- 'posed to rest, and review the history of 'their development, we are constrained to

'conclude that they do not mean to leave 'room for the play and action of purely 'personal and arbitrary power.' "

In the *Yick Wo* case referred to, it appeared that the plaintiff was arrested and convicted for violation of a city ordinance regulating the carrying on of public laundries within the limits of a municipality in California. The ordinance provided that a violation of the same would be a misdemeanor and punishable by fine and imprisonment. The conviction was upheld by the courts of California, but, on error to the Supreme Court of the United States, the judgment of the California Court was reversed and the plaintiff ordered discharged on the ground that the ordinance was arbitrary and discriminated between Chinese subjects and others in their right to conduct the same kind of business. The Court states (p. 374):

> "The fact of this discrimination is admitted. No reason for it is shown and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution."

At page 369:

> "The Fourteenth Amendment to the Constitution is not confined to the *protection of citizens*. It says: 'Nor shall any State de- 'prive any person of life, liberty or prop- 'erty without due process of law; nor deny 'to any person within its jurisdiction the 'equal protection of the laws.' These pro-

visions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws. It is accordingly enacted by Section 1977 of the Revised Statutes that 'all persons within the 'jurisdiction of the United States shall have 'the same right in every State and Territory 'to make and enforce contracts, to sue, be 'parties, give evidence, and to the full and 'equal benefit of all laws and proceedings 'for the security of persons and property as 'is enjoyed by white citizens and shall be 'subject to like punishment, pains, penalties, 'taxes, licenses, and exactions of every kind, 'and to no other.' The questions we have to consider and decide in these cases, therefore, are to be treated as *involving the rights of every citizen of the United States equally with those of the strangers and aliens* who now invoke the jurisdiction of the court * * * (p. 370). But the fundamental rights to life, liberty and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth 'may be a government of laws, 'and not of men.' For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." (Italics ours.)

Mr. Justice Matthews, writing for the court, approves the language contained in the opinion

in *Barbier v. Connolly* (113 U. S., 27), that the prohibition of the Fourteenth Amendment (p. 367)

> "undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one, except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition; and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences. * * * Class legislation, discriminating against some and favoring others, is prohibited, but legislation, which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects *alike all persons similarly* situated, is not within the amendment." (Italics ours.)

In the case of *Ward v. Maryland* (79 U. S., 430, 12 Wall.), it is said:

> "Attempt will not be made to define the words 'privileges and immunities' or to specify the rights which they are intended to secure and protect beyond what may be necessary to the decision of the case before the court. Beyond doubt, those words

> are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one state to pass into another state of the Union for the purpose of engaging in lawful commerce, trade or business without molestation, to acquire personal property, to take and hold real estate; to maintain actions in the courts of the State; and to be exempt from any higher taxes or excises than are imposed by the state upon its own citizens."

In the case of *Stockton Laundry Company*, reported in 26 Federal Reporter, 611, where a person was indicted for violating an ordinance prohibiting the maintenance of a laundry in the City of Stockton, the court said:

> "The right to labor in this or any other honest, necessary and in itself harmless calling, where it can be most conveniently, advantageously and profitably carried on, without injury to others, is one of the highest privileges and immunities secured by the Constitution to every American citizen."

In the case of the *United States v. Martin* (94 U. S., 400), after a reference to many early English statutes and statutes of various states containing labor regulations, the court states (p. 403):

> "A different theory is now almost universally adopted. Principals, so far as the law can give the power, are entitled to employ as many workmen and of whatever degree of skill and at whatever price they think fit, and, except in some special cases, as of children or orphans, the hours of labor and the price to be paid are left to the determination of the parties interested. The statute of the United States does not interfere with this principle."

In the same case, §3738 of the United States Revised Statutes, which provided that "eight "hours shall constitute a day's work for all la- "borers, workmen and mechanics now employed "or who may hereafter be employed by or on be- "half of the United States," was construed. The court said (p. 404):

> "We regard the statute chiefly as in the nature of a direction from a principal to his agent that eight hours is deemed to be a proper length of time for a day's labor and that his contracts would be based upon that theory. It is a matter between the principal and his agent, in which a third party has no interest."

Chapter 308, Vol. 1, Supplementary Revised Statutes, page 587, passed May 15, 1888, providing in substance that eight hours shall constitute a day's labor for letter carriers, came before the court for construction and was treated as a direction by a principal to its agent and within the authority of Congress.

> See *United States v. Post, et al.*, 27 Court of Claims, 224; affirmed 148 U. S., 125.

In the case of *United States v. Ollinger* (55 Fed. Rep., 959), construing Chapter 352 of the Laws of 1892, which provided that laborers employed by the Government of the United States or the District of Columbia, or by contractors or sub-contractors on public works by the United States or that district, should be limited to eight hours, the court held that the statute did not apply to a contractor who had entered into an agreement to build two barges and who employed laborers more than eight hours in each calendar day thereat, and, pointing out the limited power of Congress, said:

> "It is clear, I think, that the defendant was not a contractor within the purview of the Act of Congress. In view of the previous legislation on the subject by Congress, in view of the *limited power* of Congress to legislate on the subject, which power can only be exercised as applying to laborers and mechanics who may be employed *by or on behalf of the Government of the United States,* I am satisfied that it was never the legislative understanding and intent that the act should apply to a case like the one at bar." (Italics ours.)

These authorities would seem to show that the power of Congress to legislate has been held by the courts to be greatly restricted and to exist only where the relation between the parties affected is that of principal and agent. In other words, that Congress could give to the District of Columbia or other subordinate governmental agency in regard to matters in which they were acting as such, a direction as to employment of labor which would be valid, whereas, had a similar direction been given to an individual or any municipal corporation in the exercise of its capacity as a legal individual, it would be held to be invalid.

As pointed out by JUSTICE FIELDS in the *Slaughter House cases* (83 U. S., 97), the words "privileges and immunities" were not new in the amendment, but existed in Article IV, §2, and had often been the subject of judicial consideration and decision.

In *Butchers' Union v. Crescent City Co.* (111 U. S., 746), MR. JUSTICE FIELD says (page 757):

> "Among those inalienable rights, as proclaimed in that great document (the Declaration of Independence), is the right of men to pursue * * * any lawful business or

> vocation in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their faculties so as to give them their highest enjoyment. The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves, and have been followed in all communities from time immemorial, must, therefore, be free in this country to all alike upon the same conditions. The right to pursue them without let or hindrance, except that which is applied to all persons of the same age, sex and condition, is a distinguishing privilege of citizens of the United States and an essential element of that freedom which they claim as their birthright."

In the case of *Connolly v. Union Sewer Pipe Co.*, 184 U. S., 540, this court holds an act of the Illinois Legislature defining trusts and prohibiting their formation and imposing penalties for violation of the statute, but which provided that "This act shall not apply to agricultural products "or live stock while in the hands of the producer "or raiser," to be void as being repugnant to the Fourteenth Amendment, on the ground that it created a discrimination between the rights of different individuals, and "to be so connected and "interwoven with other sections that its invalid-"ity affected the entire act."

In answer to the claim that it was within the police power of the State, it was said (p. 558):

> "The question of constitutional law to which we have referred cannot be disposed of by saying that the statute in question may be referred to what are called police powers of the State, which, as often stated by this court, were not included in the grants of power to the General Government and therefore were reserved to the states

> when the Constitution was ordained. But as the Constitution of the United States is the Supreme Law of the land, anything in the Constitution or statutes of the States to the contrary notwithstanding, a statute of a State, *even when avowedly enacted in the exercise of its police powers, must yield to that law.* * * * The State has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health and the public safety, but if by their necessary operation its regulations looking to either of these ends amount to a denial to *persons*" (Note, not citizens) "within its jurisdiction, of the equal protection of the laws, they must be deemed unconstitutional and void. (Gibbons v. Ogden, 9 Wheat, 1, 210; Sinnot v. Davenport, 22 Howard, 227, 243; Missouri Kansas & Texas Railway v. Haber, 169 U. S., 613, 626.)" (Italics ours.)

In the case of *Missouri v. Lewis* (101 U. S., 22, 31), it is said:

> "No *person or class of persons* shall be denied the same protection of the laws which is enjoyed by other persons or classes *in the same place and in like circumstances.*" (Italics ours.)

In *Hayes v. Missouri* (120 U. S., 68, 71), this court states:

> "The Fourteenth Amendment * * * requires that *all persons* subject to legislation limited as to the objects to which it is directed, or by the territory within which it is to operate, shall be treated alike under like circumstances and considerations, both in the *privileges conferred* and in the *limitations imposed.*" (Italics ours.)

In the case of the *Gulf, Colorado and Santa Fe Railway v. Ellis* (165 U. S., 150, *supra*), a statute requiring railroads to pay attorneys' fees

in cases of the successful prosecution of suits for damages against them for certain causes, was held to be void as a violation of the Fourteenth Amendment of the Constitution, on the ground that it "singles them" (the railroads) "out of all "citizens and corporations and requires them to "pay in certain cases attorneys' fees to the par- "ties successfully suing them, while it gives to "them no like or corresponding benefit."

This court further held, as stated in the headnote:

> "The mere fact of classification is not sufficient to relieve the statute from the breach of the equality clause of the Fourteenth Amendment, and in all cases it must appear not merely that the classification has been made, but also that it is based upon some reasonable ground—something which bears a *just and proper relation* to the attempted classification and is not a mere arbitrary selection." (Italics ours.)

Again, quoting from the case of *State v. Loomis* (115 Mo., 307, 314):

> "Classification for *legislative* purposes must have some *reasonable* basis upon which to stand. It must be evident that differences which would serve for a classification for *some purposes* furnish no reason whatever for a classification for *legislative purposes.* The differences which will support class legislation must be such as *in the nature of things* furnish a *reasonable basis* for separate laws and regulations." (Italics ours.)

Again the court quotes with approval the language from the case of *Bell's Gap Railroad v. Pennsylvania* (134 U. S., 237), with regard to classification and discrimination, in which it is said:

> "All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature or the people of the state in framing their constitution. But clear and hostile discriminations *against all persons and classes,* especially such as are of an unusual character, *unknown to the practices of our governments,* might be obnoxious to the constitutional prohibition." (Italics ours.)

The court then reviews a large number of cases of various state courts to show that the principles enunciated are all-pervasive and universally recognized throughout the country. Among them is one somewhat closely in point and very instructive, namely, the case of *Pearsons v. Portland* (69 Me., 278). In that case the validity of a statute which provided that no damage to person or property caused by a defect in a highway could be recovered from any city or town by any person who, at the time the damage was done, was a resident of any country where damage done under similar circumstances was not by the laws of that country recoverable. The court held the law to be unconstitutional as in violation of the Fourteenth Amendment of the Federal Constitution. It points out that the general statutes of the State protected "every one alike" but that the act in question

> "tended to destroy this equality of protection. It declares in effect that one class of persons shall not be thus protected; but if they happen to be residents of a country where no similar protection exists, they must travel in this state at their peril and without that protection which the law affords to all of us. * * * The denial might as well be based on race or color as upon the law of a

> foreign country, for the parties affected by it may be as powerless to change the one as the other."

After the decision in the *Dartmouth College* case (4 Wheat., 517)—that the charter of a literary institution constituted a contract which could not be legally impaired by an act of the legislature, there being no reservation in the charter itself, or the law, permitting it—the various states reserved in charters of corporations or by general laws authorizing their formation, the right to repeal or modify corporate charters, so as to remove them from the operation of the constitutional inhibition against impairment. The limits placed by the courts upon this absolute power so reserved, is instructive.

In the *Sinking Fund* cases (99 U. S., 700, 720) it is said:

> "That this power has a limit, no one can doubt. All agree that it cannot be used to take away property *already acquired under the operation of the charter*, or to deprive the corporation of the *fruits actually reduced to possession* of contracts lawfully made, but, as was said by this court, through *Mr. Justice Clifford* in *Miller v. The State* (15 Wall., 498: 'It may be safely affirmed that the re-'served power may be exercised, and to al-'most any extent, *to carry into effect the 'original purposes of the grant*, or to secure 'the due *administration of its affairs*, so as to 'protect the rights of stockholders and of 'creditors, and for the proper disposition of 'the assets'; and again, in *Holyoke Company v. Lyman* (15 Wall., 519), 'to protect the 'rights of the public and of the corporators, 'or to promote the due administration of the 'affairs of a corporation.' "

In *Shields v. Ohio* (95 U. S., 319, 324), it is said:

> "The alterations must be reasonable; they must be made in good faith, and be consistent with the scope and object of the act of incorporation."

In *Railroad Co. v. Maine*, 96 U. S., 510 (p. 511), it is said:

> "Rights and interests acquired by the company, *not constituting a part of incorporation, stand upon a different footing.*" (Italics ours.)

In *Commonwealth v. Essex Co.*, (13 Gray, Mass., 239-253), MR. JUSTICE SHAW says (p. 253):

> "It seems to us that this power must have some limit, though it is difficult to define it. * * * Perhaps * * * the rule to be extracted is this: that where, under a power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property *or rights* which have become vested under a legitimate exercise of the powers granted."
>
> "This rule," says MR. JUSTICE STRONG, "has been recognized ever since" (99 U. S., 700-742).

Referring to the view of the clause of the constitution prohibiting the impairment of contracts, taken by the court in the *Dartmouth College* case, MR. JUSTICE BRADLEY observes in the *Sinking Fund cases* (*supra*, p. 748):

> "Probably, in view of this somewhat unexpected application of the clause, operating as it did, to deprive the states of nearly all legislative control over corporations of their own creation, the courts have given liberal construction to the reservation of power to alter, amend and repeal a charter and have sustained some acts of legislation made under such a reservation, which are at least questionable."

In *Miller v. The State* (15 Wall., 498) it is said:

> "Power to legislate founded upon such a reservation in a charter of a private corporation is certainly not without limit, and it may well be admitted that it cannot be exercised to take away or destroy *rights* acquired by virtue of such a charter, and which, by legitimate use of the powers granted, *have become vested in the corporation;* but it may be safely affirmed that the reserved power may be exercised, and to almost any extent, to carry into effect the original purposes of the grant, or to secure the due administration of its affairs, so as to protect the rights of the stockholders and of creditors, and for the proper disposition of the assets."

If, therefore, the State which has reserved the right and power to amend, alter or repeal the charter of a private corporation, may not legitimately exercise that power "to destroy rights acquired by virtue" of the charter granted, or "which, by a legitimate use of the powers granted have become vested in the corporation," how can it be contended that the rights of the City of New York, acquired by it under its ancient charters, or those of a later date, and also under the authority of the legislature, may be interfered with by subsequent legislative enactment? Manifestly, they may not be, and hence what is said in the *Atkin* case and others about the power of the legislature to repeal the charter of a city must be limited in its application to its rights as an agency of government.

It has been held that a grant of lands by an act of the legislature of a State to its towns may not thereafter be taken away, and the act, as the court said, "could not afterwards be repealed by the "legislature so as to divest the rights of the "towns under the grant." (*Pawley v. Clark,* 9 Cranch, 292.)

This court, in the case of *Terrett v. Taylor* (9 Cranch, 43), decided that a legislative grant or confirmation of lands for the purposes of moral and religious instruction, could no more be rescinded than other grants.

In the case of *The University v. Foy* (2 Hayw., 310), the Supreme Court of North Carolina pronounced unconstitutional and void a law repealing a grant to the University of North Carolina; although that University was originally *erected and endowed by a statute of the State.* That case was a grant of lands, and the court decided it could not be resumed.

In the *Dartmouth College* case, (4 Wheat., 517), it is said by MR. JUSTICE MARSHALL (page 629):

> "If the act of incorporation be a grant of political power, if it create a civil institution, to be employed in the administration of the government, or if the funds * * * be public property, or if the state * * * as a government be alone interested in its transactions, the subject is one in which the legislature of the state may act according to its own judgment, unrestrained by any limitation of its power imposed by the constitution of the United States."

And again (p. 632), he points out that, while education is the concern of government, nevertheless a colloge founded by private funds and accepting a charter from the state, and conducted for the education of people generally, is not a part of government or exercising governmental power.

Again (page 638) he says:

> "From the fact, then, that a charter of incorporations has been granted, nothing can be inferred which changes the character of the institution, or transfers to the government

> any new power over it. The character of civil institutions does not *grow out of their incorporations,* but out of the manner in which they are formed, and the objects for which they are created. The right to change them is not founded on their being incorporated, but on their being the *instruments of government, created for its purposes.* The same institutions, created for the same objects, *though not incorporated,* would be public institutions, and, of course, be controllable by the legislature. The incorporating act neither gives nor prevents this control." (Italics ours.)

It has been held that a grant made by a state before the Revolution is as much to be protected as a grant made since.

New Jersey v. Wilson, 7 Cranch., 164.

In *Terrett v. Taylor* (9 Cranch, 43), speaking of the power of the legislature over corporations, it is said (page 52):

> "In respect, also, to public corporations which exist only for public purposes, such as counties, towns, cities, etc., the legislature may, under proper limitations, have a right to change, modify, enlarge or restrain them, securing, however, *the property for the uses of those for whom and at whose expense, it was originally purchased.* But that the legislation can repeal statutes creating private corporations, or confirming to them property already acquired under the faith of previous laws, and by such repeal, can vest the property of such corporations exclusively in the State, or dispose of the same to such purposes as they may please, without the consent or default of the corporators, we are not prepared to admit; and we think ourselves standing *upon the principles of natural justice, upon the fundamental laws of every free*

> *government, upon the spirit and the letter of the constitution of the United States, and upon the decisions of most respectable judicial tribunals, in resisting such a doctrine.*" (Italics ours.)

In the case of *Pearsall v. Great Northern Railway* (161 U. S., 646, et seq.), it is held that under a charter or law, pursuant to which a corporation is organized, reserving the power to amend, alter or repeal an amendment, alteration or repeal is permissible, so long as the rights granted remain unexecuted; but that, after execution of the powers, this may not be done, if it affects rights acquired thereunder; that such rights are deemed to be "vested rights."

This court said (p. 661):

> "Wherever property rights have been acquired by virtue of a corporate charter, such rights, so far as they are necessary to the full and complete enjoyment of the main object of the grant are contracts, and beyond the reach of destructive legislation."

FEARNE, in his work on Contingent Remainders, defines a vested right as "an immediate fixed right of present or future enjoyment."

KENT's definition is (4 Kent Com., 202), "an immediate right of present enjoyment, or present fixed right of future enjoyment."

COOLEY, on Principles of Constitutional Law, page 332, defines rights as vested "when the "right to enjoyment, present or prospective, has "become the property of some particular person "or persons as a present interest."

In the *Pearsall* case, *supra,* this Court says (page 673):

> "As applied to railroad corporations"

(and that is what the City is, in the construction of the subway,) "it may reasonably be contended that the term extends to all rights of property acquired by executed contracts, as well as to all such rights as are necessary to the *full and complete enjoyment of the original grant*, or of property legally acquired subsequent to such grant." (Italics ours.)

In *Parrott's Case* (1 Fed. Rep., 481), SAWYER, J. says (page 510):

> "From citations already made and from many others that might be made from Justices Field, Bradley and Swayne and other judges it appears that to deprive a man of the right to select and follow any lawful occupation, that is, to labor or contract to labor, if he so desires and can find employment is to deprive him of both liberty and property within the meaning of the Fourteenth Amendment and the Act of Congress."

In that case it appeared that Article 19, §2, of the constitution of California provided:

> "No corporation now existing, or hereafter formed under the laws of this state, shall, after the adoption of this constitution, employ, directly or indirectly, in any capacity, any Chinese or Mongolians. The legislature shall pass such laws as shall be necessary to enforce this provision."

The legislature passed an act amending the penal code of the state to carry out such provision of the constitution. Section 178 thereof, among other things, made any officer, agent, servant, etc., of a "corporation now existing, or hereafter "formed under the laws of this state," liable to a fine or imprisonment, or both, for the employment of Chinese or Mongolians, except that a di-

rector who refused to assent to the employment, and had such dissent recorded in the minutes, was not to be deemed guilty.

Section 179 made the corporation itself guilty of misdemeanor for such employment, and subject to fine for the first offense, and, upon the second conviction, it was provided that there should be added to the penalty forfeiture of "its charter "and franchise, and all its corporate rights and "privileges," and imposed the duty on the attorney general to take the necessary steps to enforce such forfeiture.

The constitution also provided that the charter of any corporation formed under the general law might be modified, repealed, annulled or amended "at the discretion of the legislature."

The court held the laws to be invalid, both as being repugnant to the Fourteenth Amendment of the Constitution and in violation of the treaty with China.

It also held that the rights of corporations were violated, within the meaning of said amendment, as well as the rights of Chinese employees.

New York State Decisions.

The question of the constitutionality of the various statutes regulating the employment and compensation of laborers, enacted by the State of New York, and referred to at page 59 of this brief, was passed upon by the decisions of the highest court of that state in the following cases:

In *Clark v. State*, 142 N. Y., 101, Chapter 3 of the Laws of 1889, providing minimum wages for laborers employed by the State, was held constitutional.

In *People ex rel Rodgers v. Coler*, 166 N. Y., 1, Section 3 of Chapter 415, Laws of 1897, as

amended, providing for the payment of employees of contractors engaged on public works under contract with the state or a municipality was held unconstitutional on the following grounds:

> "1. Because in its actual operation it permits and requires the expenditure of the money of the city or that of the local property owner for other than city purposes.
>
> "2. Because it invades rights of liberty and property in that it denies to the city and the contractor the right to agree with their employees upon the measure of their compensation, and compels them in all cases to pay an arbitrary and uniform rate which is expressed in vague language, difficult to define or ascertain and subject to constant change from artificial causes.
>
> "3. Because it virtually confiscates all property rights of the contractor under his contract for breach of his engagement to obey the statute, and it attempts to make acts and omissions penal, which in themselves are innocent and harmless. It in effect imposes a penalty upon the exercise by the city or by the contractor of the right to agree with their employees upon the terms and conditions of the employment."

Again in 1904, in the case of *Ryan v. City of New York*, 177 N. Y., 271, in an action brought by an employe of the City of New York against the city to recover the difference between the prevailing rate of wages and the wages actually received by him, the court held that he was not entitled to recover and that the act was constitutional "so far as it relates to the direct employes of the state or a municipality thereof," thus drawing the sharp distinction between the

effect of the act as regards the direct employes of a state or municipality and the rights of a contractor, with the city, who had failed to pay the prevailing rate to his employees.

In *People ex rel. Cossey v. Grout*, 179 N. Y., 417, CULLEN, C. J., points out (at page 424) that the decision in the *Ryan* case is merely to the effect that the legislature may prescribe the rate of wages to be paid

> "where the municipality itself undertakes the construction of a public work"

and does not apply to cases where the municipality has let work to an independent contractor even if that work be a public work.

The *Cossey* case was decided in the same year as the *Ryan* case and of the seven judges participating in the decision of the *Ryan* case five of them participated in the decision of the *Cossey* case.

In the *Cossey* case the Court of Appeals held that an individual who had supplied scows to the Street Cleaning Department under a contract providing for compliance with the provisions of Chapter 415 of the Laws of 1897 as amended (a statute in substantially the same form as the statute now before the Court) was entitled to recover the contract price, although he had failed to comply with the provisions of the statute incorporated in the contract. It based its decision upon the unconstitutionality of the section of the Labor Law so far as it affected the rights of the City. Five of the judges concurred on this proposition.

O'BRIEN, J., denies the proposition that the *Atkin* case interfers with the decision of the *Rodgers* case in any way, and MARTIN and VANN, JJ., concur with him.

The situation, then, under the Court of Ap-

peals decisions comes to this, that the *Rodgers* case held the law unconstitutional because it violated the rights of the contractor as well as those of the City; the *Ryan* case drew the distinction that it was valid so far as it applied to contracts of employment upon public works directly between the State and its employees, a distinction which O'BRIEN, J., says in the Cossey case he will not consider but

> "Will only add now that the distinction, even if sound, can be of no practical consequence for the State can always circumvent or evade it by employing contractors."

The decision in the *Rodgers* case was followed by a majority of the Court so far as it decided that the law was unconstitutional in that it affected the rights of the municipality, but the judges were divided on the other proposition, namely, that it was invalid also because of its violation of the rights of contractors, three judges still adhering to the view that it was unconstitutional upon the latter ground and two asserting the contrary. Hence the *Rodgers* case still stands as an authority in the State of New York for both propositions decided by it under the constitution of the state prior to its amendment.

In 1905 in *Myers v. State of New York*, 58 App. Div., 534, the statute was again held unconstitutional.

In the same year the people of the state adopted an amendment to Section 1, Article 12 of the constitution. The amendment consists of the words italicised in the following provision:

> "It shall be the duty of the legislature to provide for the organization of cities and incorporated villages and to restrict their power of taxation and assessment, borrowing money, contracting debts and loaning

their credit, so as to prevent abuses in assessments and in contracting debt by such municipal corporations.

"And the legislature may regulate and fix the wages or salaries, the hours of work or labor, and make provision for the protection, welfare and safety of persons employed by the state or by any county, city, town, village or other civil division of the state, or by any contractor or sub-contractor performing work, labor and services for the state or for any county, city, town, village or other civil division thereof."

It should be here borne in mind that the provisions prohibiting the employment of alien labor and giving preference to citizens of this State in the employment of labor upon municipal works, existed in the statute prior to the decision of the *Rodgers* case and the other cases mentioned.

While the provisions in regard to the employment of alien labor and giving preference to citizens of this State were not at issue in the *Rodgers* case or in the cases referred to, nevertheless the opinion of the court in the *Rodgers* case clearly indicates that they came equally within the condemnation of the constitution with the provisions which the court condemned as unconstitutional. Speaking of them, O'BRIEN, J., who wrote the prevailing opinion, says (page 17):

"The contractor is not only deprived of the right to make such contracts with his workmen as would be mutually acceptable and beneficial, but he is required in selecting his employees to give preference to citizens of this State. Citizens of other states and resident aliens are thus subject to harsh discrimination. The citizens of each state are entitled to all the privileges and immunities of citizens in the several states under the Federal Constitution, and persons still un-

naturalized are protected by the broad principles of international law. It is not necessary to inquire how far, if at all, the rights of citizens of other states seeking employment here, or those of aliens who have come here to improve their condition and to earn an honest living are ignored or restricted by this statute. These questions have not been raised or argued, and we will only remark that it reverses the settled policy of this state from the earliest times. The policy of New York has always been to welcome not only the citizens of our sister states but emigrants from abroad to equal participation in all the opportunities and advantages of its business and industrial life. If the policy indicated in the statute now under consideration had been formulated and carried into operation half a century earlier, it may be that the growth and progress of the state would not be the subject of so much pride or as gratifying to all the people as it is now. These conclusions result from principles that have been often stated by this court when paternal legislation of the same character was under consideration." Citing

In *re Jacobs*, 98 N. Y., 98;
People v. Marx, 99 N. Y., 378;
People v. Gillson, 109 N. Y., 389;
Colon v. Lisk, 153 N. Y., 188;
People v. Hawkins, 157 N. Y., 1;
People ex rel. Tyroler v. Warden, 157 N. Y., 116.

It would seem to require no argument to show that if the provisions as to hours of labor and rates were condemned in the *Rodgers* case as repugnant to the state constitution, the provisions barring aliens absolutely and preferring citizens of the State of New York are likewise repugnant to the State constitution for similar and for additional and even stronger reasons.

It is fair to assume, therefore, that if the people of New York *approved of the policy embodied in those provisions,* particularly in view of the pointed statement of the Court of Appeals that in its opinion they offended against constitutional provisions, they would have attempted to procure an amendment to the State constitution, authorizing these provisions, at the same time that they adopted the other amendments mentioned. Their failure to do so, it may be assumed, indicated that they regarded any attempt to adopt such an amendment as so palpably a violation of the provisions of the United States constitution and of existing treaties and of fundamental law and natural justice, that such an amendment would be a nullity upon its adoption. That this was their view is further indicated by the fact that these provisions against the employment of aliens and preferring citizens of the State of New York have uniformly been ignored, both by contractors and municipalities, a fact which is set forth in the complaint and admitted by the demurred (Record, page 19).

The following brief extracts from decisions of the Court of Appeals of the State of New York furnish abundant authority in support of the proposition that the prohibition against the employment of alien labor and preference to citizens of the State of New York were in violation of the provisions of the federal constitution and directly contrary to the fundamental policy at the foundation of our government and to the principles interwoven with its history and institutions from the earliest period.

At any rate the rights, privileges and immunities of the citizens of the state of New York, as defined and protected by its highest court, it must be evident, have been denied to citizens of

sister states, as well as to aliens, by the decision of the same court in the present case, and hence that decision denies to them the equal protection of the laws.

In *Matter of Jacobs,* 98 N. Y., 98, in speaking of a statute prohibiting the manufacture of cigars in tenement houses, EARL, J. says, (pages 105-106):

> "It is, therefore, plain that this law interferes with the profitable and free use of his property by the owner or lessee of a tenement house who is a cigar maker and trammels him in the application of his industry and the *disposition of his labor, and thus in a strictly legitimate sense it arbitrarily deprives him of his property and of some portion of his personal liberty.* * * * So, too, one may be deprived of his liberty and his constitutional rights thereto violated without the actual imprisonment or restraint of his person. Liberty in its broad sense, as understood in this country, means the right not only of freedom from actual servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live and *work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation.*" (Italics ours.)

In *Bertholf v. O'Reilly,* 74 N. Y., 509, Andrews, J. says, at page 515:

> "The right to liberty includes the right to * * * follow a lawful avocation for the support of life."

In *People v. Marx,* 99 N. Y.. 377 Rapallo, J. says, at page 386:

> "No provision is now more firmly settled than that it is one of the fundamental rights and privileges of every American citizen to *adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit.*"

In *People v. Williams,* 189 N. Y., 131, Gray, J. says, at page 134:

> "The provisions of the state and of the federal constitution protect their citizens in the right to pursue any lawful employment in a rightful manner. He enjoys the utmost freedom to follow his chosen pursuit and any arbitrary distinction against or deprivation of that freedom by the legislature is an invasion of the constitutional guarantee."

And, at page 136, speaking of the rights of an adult female, he says:

> "She is entitled to enjoy unmolested her liberty of person and her freedom to work *for whom she pleases,* where she pleases, and as long as she pleases, *within the general limits operative on all persons alike.*"

Nor can the provisions of the Labor Law in question find support in the doctrine of the police power of the state as defined in many cases in its highest court.

In *Colon v. Lisk,* 153 N. Y., 188, where the question before the court was the constitutionality of a statute providing for the summary seizure of a vessel used by

> "One person in interfering with oysters or other shell fish belonging to another and for its forfeiture and sale,"

the court held the statute unconstitutional.

In speaking of the police power, MARTIN, J., says, at page 197:

> "That power must be exercised subject

> to the provisions of both the federal and state constitutions. Laws passed in the exercise of it must tend towards the preservation of the lives, health, morals or welfare of the community, and the court must be enabled to see some clear and real connection between the assumed purpose of the law, and the actual provisions thereof, and that the latter tend in some plain and appreciable manner towards the accomplishment of the objects for which the legislature may use this power (*Health Department v. Rector,* 145 N. Y., 32, 39)."

And again, at page 198:

> "In this case we have a statute which authorizes the seizure, sale and complete appropriation by the state of the property of an individual, which may reach in value many thousands of dollars. It is manifest that this extraordinary and extreme statute is not necessary and was not intended for the protection of the public. Its sole purpose was to regulate private interests and enforce private rights. In no sense can it be regarded as a police law, and, consequently, is not within the police power."

If the forfeiture in the *Colon* case was "extraordinary and extreme," the forfeiture of the contracts in the present instance must be considered at least equally extraordinary and extreme.

In *People v. Orange County Road Construction Co.,* 175 N. Y., 84, where the defendant had been indicted for violation of the eight hour provision in the statute, the Court of Appeals sustained a demurrer to the indictment.

CULLEN, J., says at page 87:

> "It seems to me to be entirely clear that the statute cannot be upheld as an exercise

> of the police power vested in the Legislature. I should think the proposition too plain for debate, but, if this assertion be considered dogmatic, then I say that the question is settled by the decisions both of this court and the Supreme Court of the United States. While the field for the exercise of the police power, subject to which all property is possessed by the citizens and all his callings or vocations must be pursued, is very broad, so broad that no court has sought to define accurately its extent, still it is subject to recognized limitations."

After citing various authorities in support of the proposition above stated, the court says (p. 88):

> "The statute now before us does not deal with the character of the work, the age, sex or condition of the employees, not even the personality of the employer, but applies only to the case of a contract with a state or municipality. *What possible bearing on the health or security of the employees, or on the public health, has the fact that the employer is executing a contract for the construction or performance of a State or municipal work?* • • •The vice of the statute is the arbitrary distinction drawn between a person contracting with the state and other employers." (Italics ours.)

An act of the legislature cannot transform an innocent and harmless act into a crime.

Lawton v. Steele, 119 N. Y., 226.

As ANDREWS, J., says, at p. 233:

> "The legislature may not declare that to be a crime which in its nature is and must be under all circumstances innocent, nor can

it in defining crimes, or in declaring their punishment, take away or impair any inalienable right secured by the Constitution."

Apart from the foregoing considerations, Section 14 of the Labor Law on its face applies to contracts in existence at the time of its passage, as well as to contracts to be entered into after its passage, and is therefore void.

Wynhamer v. People, 13 N. Y., 378;
People v. Orange Co. R. C. Co., 175 N. Y., 84.

DECISIONS OF OTHER STATES.

The decisions and policy of other States are in harmony with the views above expressed and show their common recognition throughout the Union. These views find emphatic expression in the decisions of the courts of the various states in passing upon the validity of similar statutes.

In *State v. Goodwillie* (25 Am. Rept., 866), it is said:

"The property which every man has in his own labor, as it is the foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in strength and dexterity of his own hands, and to hinder him from employing those in what manner he may think proper, without injury to his neighbor, is a plain violation of this most sacred property. It is equally an encroachment upon the just liberty and rights of the workman and his employer, or those who might be disposed to employ him, for the legislature to interfere with the freedom of contract between them, as such interference hinders the one from working out what he thinks proper and at the same time prevents the other from employing whom he chooses. A

> person living under the protection of this government has a right to adopt and follow any lawful pursuit, not injurious to the community, which he may see fit; and as an incident to this is the right to labor or employ labor, to make contracts in respect thereto upon such terms as may be agreed upon by the parties, to enforce all lawful contracts, to sue and give evidence and to inherit, purchase, lease, sell and convey property of every kind."

In the case of *Ex-Parte Kuback* (85 Cal., 274), with reference to an ordinance making it a misdemeanor to employ Chinese on public works or to permit any employees on such works to work more than eight hours a day, the Supreme Court of California said:

> "It is claimed in support of the petition that this ordinance was unconstitutional and void. We think this objection is well taken. It is simply an attempt to prevent certain parties from employing others in a lawful business and paying them for their services, and is a direct infringement on the rights of such persons to make and enforce their contracts."

In the case of *Ramsey v. The People of the State of Illinois* (142 Ill., 380), it is held that

> "An act of the legislature of the State of Illinois, which requires the owners and operators of coal mines, when the miner is paid on the basis of the amount of coal mined and delivered by him, to weigh the coal on pit cars before it is screened, and pay on such weights, is a violation of the State Constitution as depriving a class of persons of the liberty and property right of making contracts."

In the case of *Commonwealth v. Perry* (155

Mass., 117), an act of the legislature of the State of Massachusetts which provided that no employer should impose a fine upon an employee engaged in weaving, or withhold his wages, in whole or in part, for imperfections that might arise during the process of weaving, was held to be in conflict with the constitution of that state in forbidding employers to withhold any part of the contract price from such weaver upon his doing the work improperly and in requiring such employer to pay the same price for inferior work as for good work, and particularly with the first article of the declaration of rights, which secures to all the right of acquiring, possessing and protecting property.

In the case of *State v. Loomis* (115 Mo., 307), an act forbidding a corporation, person or firm engaged in mining or manufacturing to issue in payment of wages of its laborers an order, check, memorandum, token or evidence of indebtedness, payable otherwise than in lawful money of the United States, was held void.

In *Godcharles v. Wigeman* (113 Pa. St., 431), the court holds that a statute designed to prevent persons employed by mining and manufacturing corporations from utilizing the conveniences of a company store, is unconstitutional, in that it prevents persons who are *sui juris* from making their own contracts.

In *Frorer v. The People* (141 Ill., 171), a similar statute was held unconstitutional. The court says at page 181:

> "The privilege of contracting parties is both a liberty and a property right."

State v. Fire Creek & Coke Co., 25 Am. St. Rep., 891.

In *McChesney v. The People*, 200 Ill., 146, it is

held that a stipulation in a municipal construction contract not to employ aliens is unconstitutional.

In the *City of Chicago v. Hurlbert*, 205 Ill., 246, it is held that a state statute providing for the insertion of such a stipulation is unconstitutional and "neither the city nor the contractor is under any obligation to observe it."

In the foregoing argument (pages 58 to 94) we have found it convenient to discuss the authorities upon the general propositions involved, without separate consideration of the different provisions of the constitution which we assert render Section 14 of the Labor Law invalid, because in many instances the decisions cited discuss several of those provisions, but a separate discussion of Article I, Section 10, forbidding the impairment of the obligation of contracts, of the Fourteenth Amendment, forbidding deprivation of liberty and property without due process of law, and of Article IV, Section 2, forbidding state discrimination against citizens of other states, will, perhaps, be of assistance.

ARTICLE I, SECTION 10, SEPARATELY CONSIDERED.

This section provides:

> "No state shall * * * pass any *ex post facto* law, or law impairing the obligation of contracts."

It must be kept in mind that Section 14 of the Labor Law which prohibits the employment of aliens, and grants a preference to the citizens of the State of New York upon the public works of that State, had its origin in Chapter 622 of the Laws of 1894, and that three years prior to the adoption of the statute in its original form, the legislature had adopted the Rapid Transit Act

(Chap. 4 of the laws of 1891, entitled "An act to provide for rapid transit railways in cities of over one million inhabitants,") and that the complaint which has been demurred to, alleges, (Record, page 18, paragraph 25 of complaint), that the employment of laborers who were not citizens of the United States or citizens of the State of New York, was necessary for the construction of the Rapid Transit System authorized by Chapter 4 of the Laws of 1891 because:

> "At no time * * * has there been available or could there be obtained by said contractors, or any of them, a sufficient force or number of laborers, citizens of the United States or the State of New York, to do the work called for by said contracts within the times respectively within which the said contracts were required to be performed, nor is there at present, nor has there been at any of the times herein mentioned, available or to be had, a sufficient force and number of such laborers to perform the work necessary to construct and complete the Dual System of rapid transit herein described, within any reasonable time."

In other words, if section 14 of the Labor Law was intended to apply to work done under the Rapid Transit Act, the grant of power to "cities of over one million inhabitants," which was accepted by the City of New York, has left that city in a position where it has squandered millions of dollars in the incipient stages of rapid transit subway construction, without hope of ever completing the system it was authorized by the Rapid Transit Act to construct and operate, much less of ever receiving any return upon the millions so invested.

The situation here is strikingly analogous to the situation presented to this Court in *Russell v. Sebastian*, 233 U. S., 195.

In that case plaintiff in error had been arrested upon the charge of excavating in a street of Los Angeles in violation of a municipal ordinance. He was acting at the time of his arrest on behalf of the Economic Gas Company, a public corporation supplying the inhabitants of Los Angeles with gas, and was engaged in preparing to lay its pipes in a street which it had not previously used.

The company was proceeding under a claim of right based upon section 19 of Article 11 of the State Constitution, adopted in the year 1879, which read as follows:

> "Sec. 19. In any city where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light, any individual, or any company duly incorporated for such purpose, under and by authority of the laws of this state, shall, under the direction of the superintendent of streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe, for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants, either with gas-light, or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof."

This section of the constitution was, however, amended in the year 1911, so as to read as follows:

> "Sec. 19. Any municipal corporation may establish and operate public works for sup-

> plying its inhabitants with light, water, power, heat, transportation, telephone service or other means of communication. Such works may be acquired by original construction or by the purchase of existing works, including their franchises, or both. Persons or corporations may establish and operate works for supplying the inhabitants with such services upon such conditions and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal government shall have the right to regulate the charges thereof. A municipal corporation may furnish such services to inhabitants outside its boundaries; *provided*, that it shall not furnish any service to the inhabitants of any other municipality owning or operating works supplying the same service to such inhabitants, without the consent of such other municipality, expressed by ordinance."

Thereupon, by ordinance approved October 26, 1911, the City of Los Angeles provided that no one should exercise any franchise or privilege to lay or maintain pipes or conduits in the streets for conveying gas, water, etc., without having obtained a grant from the city in accordance with the city's charter and the procedure prescribed by the ordinance, unless such person (or corporation) might be "entitled to do so by direct and unlimited authority of the constitution of the State of California, or of the constitution or laws of the United States." Another ordinance, approved February 21, 1912, declared that it should be unlawful to make any excavation in the street for any purpose without written permission from the board of public works, and that, before issuing the permit, the board should require the applicant to show legal authority to use the streets for the purpose specified. The arrest of the plaintiff in

error had been under the last mentioned ordinance.

The Supreme Court of the State of California had dismissed a writ of habeas corpus sued out by the plaintiff-in-error. He contended that the municipal ordinances and the constitutional amendment upon which they rested, so far as they interfered with the extension by his employer of its lighting system, impaired the obligation of the company's contract, deprived it of property without due process of law, and denied it the equal protection of the laws.

Considerable money had been invested by the employer of the plaintiff-in-error in the manufacture and distribution of gas within the city prior to the amendment of the constitution in 1911, but its plant had been established with a view to an increased demand for its service.

This court held, MR. JUSTICE HUGHES writing its opinion, that the amendment of 1911 to the constitution and municipal ordinances was ineffectual to impair the right of the company to extend its mains for the purpose of distributing its supply to the inhabitants of the city, subject to the conditions set forth in the constitutional provision as it existed prior to the amendment of 1911.

The case is so close in principle, in our view, to the case at bar, that we feel justified in quoting liberally from the opinion of MR. JUSTICE HUGHES. He says (page 202):

> "As to the nature and extent of the right acquired by the company prior to the constitutional amendment * * * in view of the appeal to the clause of the federal constitution prohibiting state legislation impairing the obligation of contracts, it is the duty of this Court to determine for itself. (*Douglas v. Kentucky*, 168 U. S., 485, 502; *Northern*

Pacific Railroad v. Duluth, 208 U. S., 583, 590; *Grand Trunk Western Railway v. South Bend,* 227 U. S., 544, 551; *Atlantic Coast Line R. R. Co. v. City of Goldsboro,* 232 U. S., 548, 556.)"

Construing the authorization contained in the constitution of 1879 as an offer, he continues (page 206):

"There is no ambiguity as to the scope of the offer. It was not simply of a privilege to maintain pipes actually laid, but to lay pipes *so far as they might be required in order to effect an adequate distribution.* * * *

"*The breadth of the offer was commensurate with the requirements of the undertaking which was invited.* The service to which the provision referred was a community service. *It was the supply of a municipality—* * * *

"The individual or corporation undertaking to supply the city with water or light was put in the same position as though such individual or corporation had received a special grant of the described street rights in the city which was to be served. Such a grant would not be one of several distinct and separate franchises. *When accepted and acted upon it would become binding—not foot by foot as pipes were laid—but as an entirety, in accordance with its purpose and express language.* (Grand Trunk Railway Co., v. South Bend, 227 U. S., 544, 555, 556)." (Italics ours.)

To sustain the contention of the defendant-in-error that the company, because of the amendment to the constitution of 1879, could not open streets to extend pipes beyond those already in place, he says (page 208):

"But this is to say that the offer as made could not be accepted at all; that the right to lay pipes could not in any event be acquired.

It is to assume, despite the explicit statement of the constitutional provision, that the investment in extensive plants * * * was invited without any assurance that the laying of the distributing system could be completed, or that it could even be extended far enough to afford any chance of profit. *It would be to deny the right offered, although essential to the efficacy of the enterprise, and in its place to give a restricted and inadequate right* * * * (Italics ours).

"In view of the nature of the undertaking in contemplation * * * we find no ground for the conclusion that each act of laying pipe was to constitute an acceptance *pro tanto*. We think that the offer was intended to be accepted in its entirety as made, and that acceptance lay in conduct committing the person accepting to the described service.

"The offer was made to the individual or corporations undertaking to serve the municipality, and when that service was entered upon and the individual or corporation had changed its position, beyond recall, we cannot doubt that the offer was accepted. (*City Ry. Co. v. Citizens R. R. Co.*, 166 U. S., 557, 568; *Grand Trunk Ry. Co. v. South Bend*, 227 U. S., 544.) In this view the grant embraced the right to lay the extensions that were needed in furnishing the supply within the city."

"This construction of the constitutional provision is the only one that is compatible with the existence of the duty which it was intended, as it seems to us, that the recipient of the state's grant should assume."

"The service, as has been said, was a community service."

Mr. Justice Hughes (at page 209) quotes with approval the language of the court in *People ex rel. Woodhaven Gas Co. v. Deehan*, 153 N. Y., 528, 533, as follows:

> "'It is well known that business enterprises such as the relator is engaged in are based upon calculations of future growth, and expansion. A franchise for supplying gas not only confers a privilege, but imposes an obligation, upon the corporation to serve the public in a reasonable way. The relator is bound to supply gas to the people of the town upon certain conditions and under certain circumstances, *and it would be most unjust to give such a construction to the consent as to disable it from performing its obligation.*'" (Italics ours.)

In the New York Rapid Transit Act every step in the prosecution of the work of construction, equipment and operation is made mandatory on the city, once the general plan has been adopted. The consent of the owners of property along the routes adopted must be obtained, if possible, or failing in that, application made to court for the necessary authorization to begin construction (Section 5, Sub. 4); detailed plans and specifications must be prepared (Section 6); the necessary real estate must be acquired (Section 20); forms of proposed contracts must be advertised for public hearing thereon, a hearing held and forms adopted (Section 37, Sub. 2); the forms of contracts, when adopted, must be advertised for proposals, the contracts let (Section 36) and the work under them prosecuted to completion. The necessary money, aggregating many millions of dollars, must be supplied by the city (Sections 9 and 10).

The concluding paragraph of the opinion of MR. JUSTICE HUGHES so aptly applied in the present instance, that we quote it at length.

> "As to the question of fact, the present case presents no controversy. It was averred, and not denied, that the works of the gas company were established and operated

with the intent to furnish gas throughout the city, wherever needed, and that this enterprise had been diligently prosecuted; that a large investment had been made in a plant which was adequate to supply a much greater territory than that reached by the distributing mains when the amendment of 1911 was adopted; that the expense of this installation made it impossible to supply at a profit the limited territory contiguous to the streets then actually occupied by the company; and that if it were confined in its service to that territory it would sustain a constant loss. *The company, by its investment, had irrevocably committed itself to the undertaking and its acceptance of the offer of the right to lay its pipes, so far as necessary to serve the municipality, was complete.*" (Italics ours.)

In *Van Hoffman v. The City of Quincy*, 4 Wallace, 535, the defendant-in-error was authorized by a state statute to issue certain bonds and to exercise the power of local taxation to raise the money necessary to pay the annual interest upon the bonds. Bonds were issued pursuant to this statute, some of which were bought by the plaintiff-in-error. The City defaulted in the payment of interest upon the bonds, and the plaintiff-in-error sought to compel the city, by mandamus, to pay a judgment obtained by him against it upon the bonds, and, if necessary, to levy the special tax provided for in the act of the legislature, pursuant to which the bonds had been issued.

The city's answer to the petition for a writ of mandamus set up a statute of the State of Illinois, passed after the issue of the bonds of which plaintiff was the holder, which prohibited the levy by any city of annual taxes, for the purpose of paying its debts and meeting its general expenses, exceeding 50 cents on each $100 of assessed valuation of real and personal property,

and averred that the full amount of the annual tax authorized by this latter statute had been assessed and was in process of collection; but that when collected it would not be sufficient to pay the current expenses of the city for the year and the debts of the city.

The relator demurred to the answer and judgment was granted for the defendant in the state courts.

The two questions raised in this court were:

First: Did the second statute impair the obligation of a contract? and

Second: If it did, would a mandamus lie against the city to compel it to levy a tax to pay the debt?

This court answered both questions in the affirmative.

In speaking of the constitutional prohibition against the impairment of the obligation of contracts, MR. JUSTICE SWAYNE says (at page 552):

> "The obligation of a contract 'is the law which binds the parties to perform their agreement' (*Sturgis v. Crowningshield*, 12 Wheaton, 257). The prohibition has no reference to the degree of impairment. The largest and least are alike forbidden. In *Greene v. Biddle*, 8 Wheaton, 84, it was said: 'The objection to a law on the ground of its impairing the obligation of a contract can never depend upon the extent of the change which the law effects in it. Any deviation from its terms by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation.

> • • • One of the tests that a contract has been impaired is that its value has, by legislation, been diminished. It is not, by the constitution, to be impaired at all. This is not a question of degree or cause, but of encroaching, in any respect, on its obligation, dispensing with any part of its force. (Planters Bank v. Sharp, 6 Howard, 327.)' "

In *St. Louis v. Western Union Telegraph Co.*, 148 U. S., 92, MR. JUSTICE BREWER, referring with approval to the case of *New Orleans v. Southern Telephone and Telegraph Co.*, 40 La. Ann., 41, says (p. 103):

> "In that case it appeared that the telephone company had set its poles and constructed its lines under and by virtue of the grant made by the ordinance, and hence the conditions named therein were held part of the contract between the city and the telephone company, which the former was not at liberty to disregard. As stated in the opinion, page 45: 'Obviously, upon the clearest considerations of law and justice, the grant of authority to defendant when accepted and acted upon, became an irrevocable contract, and the city is powerless to set it aside or to interpolate new and more onerous considerations therein.' Such has been the well-recognized doctrine of the authorities since the *Dartmouth College Case*, 4 Wheat., 518."

The same language is again approved by this court in *Grand Trunk Western Railway Co. v. South Bend*, 227 U. S., 544, a case in which the facts are so closely analogous to the facts in the present case.

In that case, this court held that a franchise to maintain and operate a double track railway cannot be abrogated under the guise of regulation.

MR. JUSTICE LAMAR says (p. 553):

> "In every case like this involving an inquiry as to whether a law is valid, as an exertion of the police power, or void, as impairing the obligations of a contract, the determination must depend on the nature of the contract and the right of government to make it. The difference between the two classes of cases is that which results from the want of authority to barter away the police power, whose continued existence is essential to the well-being of society, and the undoubted right of government to contract is made, to destroy or impair its obligation."

And (at page 556):

> "This franchise was single and specific, and when accepted and acted upon became binding,—not foot by foot, as the rails were laid—but as an entirety. Here the company not only accepted the ordinance and constructed the road, but, relying on the franchise, acquired from the abutters by purchase or condemnation an 18-foot strip with a view of laying thereon a double track as the increase in business made that necessary. Subsequently it built the double track for a part of the distance and has not abandoned or forfeited the right to use the balance of the easement when needed for the discharge of its public duties as a carrier."

See also *Miller v. State,* 15 Wall., 498, referred to at page 76, *supra,* and *Pearsall v. Great Northern Ry.*, referred to at page 79, *supra,* holding that a franchise and all the rights necessary to its full and complete enjoyment, are alike protected from impairment under the constitutional guaranty.

In the case of *Thomas v. Railroad Co.,* 101 U. S., 71, MR. JUSTICE MILLER says, at page 83:

> "Where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exer-

> cised for the public good, the due preformance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes without the consent of the state to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the state and is void as against public policy."

If the railroad company could not release itself from the implied obligation or duty resulting from the acceptance of its charter, it must be clear that the state was similarly bound on its part to respect the obligation it incurred upon the acceptance of the grant or charter by the company.

When, therefore, it has been held by the highest court of the State of New York and is conceded that the Rapid Transit Act simply confers upon the city a franchise in the exercise of which it is acting as a railroad corporation, (Matter of Rapid Transit R. R. Commissioners, 197 N. Y. 81), manifestly any subsequently enacted law which impairs the rights acquired under the franchise is void.

Indeed it may well be held that the enforcement of a preexisting law so as to have the same effect upon the franchise would be equally void, as in conflict with the principle prohibiting the impairment of contracts, on the ground that the special act, giving the franchise, modified the preexisting law and made it inapplicable to the franchise granted in so far as it would, if enforced, impair it.

The city having made contracts pursuant to the express power conferred upon it by the legislature, the state became estopped form enforc-

ing any law or condition that would prevent this city from performing them or create unnecessary burdens.

City Railway Co. v. Citizens R. R. Co., 166 U. S., 557, 566.

The rights and interests of the corporations which and of the individuals who entered into contracts with the city to furnish the necessary money to the city to enable it to carry out the contracts so authorized, are entitled to protection as against any state action that would impair or destroy them (Id., pp. 566, 567).

THE FOURTEENTH AMENDMENT SEPARATELY CONSIDERED.

This amendment provides:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any state deprive any person of life, liberty or property *without due process of law*, nor deny to any person within its jurisdiction the equal protection of its laws."

As we have shown, *supra* (pages 46 to 56), statutes contravening the principles of natural justice are void, even in the absence of constitutional restrictions upon a legislature's power, but there is abundant authority in support of the proposition that the principles of natural justice are the principles determining what is and what is not "due process of law" within the Fourteenth Amendment.

See *Camp v. Rogers*, 44 Conn., 291, in which many authorities are reviewed, particularly at page 297, where the court says:

> "As to the meaning of the expression 'due process of law,' as used in many of the con-

stitutions of the states of the Union, Cooley, in his *Constitutional Limitations* (p. 355), says: 'We have met in no judicial decision a statement that embodies more tersely and accurately the correct view of the principle we are considering, than the following from an opinion of Mr. Justice Johnson of the Supreme Court of the United States.' 'The good sense of mankind has at length settled down to this—that these words were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.' Again, he says (p. 358), speaking of the cases where courts of equity order the property of one man to become vested in another: 'In these cases courts proceed in accordance with the law of the land, and the right of one man is divested by way of enforcing a higher and better right in another.' Again, he says (p. 175): 'The bills of rights in the American constitutions forbid that parties shall be deprived of property except by the law of the land; but if the prohibition had been omitted, a legislative enactment to pass one man's property over to another would, nevertheless, be void.' In *People v. Morris*, 13 Wend., 328, it is said that 'vested rights of the citizen are sacred and inviolable against the plentitude of power in the legislative department.' In *Ham v. McClaws*, 1 Bay (So. Car.), 93, it is laid down that 'statutes passed against the plain and obvious principles of common right and common reason are null and void, so far as calculated to operate against those principles'; and in *Morrison v. Barksdale*, Harper, 101, that 'if absurd consequences, or those manifestly against common reason, arise collaterally, out of a statute, it is pro tanto void.' And See Welch v. Wadsworth, 30 Conn., 150."

In *Hurtado v. People of California*, 110 U. S.,

516, the opinion of MR. JUSTICE MATTHEWS contains an exhaustive examination of authorities on the meaning of the words "due process of law," as contained in the Fourteenth Amendment. While holding that an information is due process to justify a prosecution for crime and that an indictment is not necessary, he quotes with approval the language of MR. JUSTICE JOHNSON in *Bank v. Oakley*, 4 Wheaton, 235-244, as follows (page 527):

> "As to the words from Magna Charta incorporated into the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at last settled down to this: that they were intended *to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice.*" (Italics ours.)

Referring to Magna Charta and the Bill of Rights and the fact that written constitutions were deemed essential in this country to protect the rights or liberties of the people, MR. JUSTICE MATTHEWS says, (page 532):

> "It necessarily happened, therefore, that as these broad and general maxims of liberty and justice held in our system a different place and performed a different function from their position and office in English constitutional history and law, they would receive and justify a corresponding and more comprehensive interpretation. Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation; but in that application, as it would be incongruous to measure and restrict them by the ancient customary English law, they

must be held to guarantee not particular forms of procedure, but the *very substance of individual rights to life, liberty and property.*" (Italics ours.)

and at page 535:

"But it is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every act, legislative in form, that is law. *Law is something more than mere will exerted as an act of power.* It must be not a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his familiar definition, 'the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial,' so 'that *every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society,*' and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both state and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the

> rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government." (Italics ours.)

He quotes with approval the opinion of the Supreme Court of Mississippi in *Brown v. Levee Commissioners,* 50 Miss., 468, where that court says with regard to "due process of law" (page 536):

> " 'The principle does not demand that the laws existing at any point of time shall be irrepealable, or that any forms of remedies shall necessarily continue. *It refers to certain fundamental rights which that system of jurisprudence, of which ours is a derivative, has always recognized.* If any of these are disregarded in the proceedings by which a person is condemned to the loss of life, liberty, or property, then deprivation has not been by due process of law.' "

MR. JUSTICE MATTHEWS also cites with approval the opinion of MR. JUSTICE MILLER, in *Loan Association v. Topeka,* 20 Wallace, 655-662, which says:

> " 'It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute depository of power, is after all but a despotism.' "

While the recent case of *Raich v. Truax,* 219 Fed. Rep., 273, involving the constitutionality of the Arizona "alien law," is not exactly parallel with the present case, it is a convincing authority

in so far as it treats of the general subject here discussed.

We have shown by reference to the decisions of the New York Court of Appeals (pages 86 to 92, *supra*), that rights, which it held inviolable in favor of its own citizens, have been denied to aliens and to citizens of other states by the decision appealed from in the present case and hence that such aliens and citizens have been denied the equal protection of the laws, guaranteed them by the constitution.

ARTICLE IV, SECTION 2, SEPARATELY CONSIDERED.

That section provides:

> "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

The preference granted citizens of the State of New York by the Labor Law is, we submit, a direct and flagrant violation of the provisions of this section.

It evidently denies to them rights, recognized and secured to the citizens of the State of New York by its constitution and laws and the decisions of its highest court. (See decisions of the New York Court of Appeals referred to at pages 86 *et seq., supra.*)

But for this provision of Article IV, citizens of each state would be aliens in every other state and only entitled to rights as such.

As MR. JUSTICE MILLER says in the *Slaughter House cases,* 16 Wallace, 36 (at page 75, et seq.), with regard to the rights of citizens of each state:

> "The first and leading case on the subject

> is that of *Corfield v. Coryell*, decided by Mr. Justice Washington in the Circuit Court for the District of Pennsylvania in 1823 (4 Washington's Circuit Court Reports, p. 371), 'The inquiry,' he says, 'is, what are the privileges and immunities of citizens of the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are *fundamental;* which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several states, which compose this union, from the time of their becoming free, independent and sovereign. What these fundamental principles are, it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads; protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole.' "

Continuing, in the *Slaughter House Cases*, MR. JUSTICE MILLER says, with regard to this constitutional provision (at page 77):

> "Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, *neither more or less*, shall be the measure of the rights of citizens of other States within your jurisdiction." (Italics ours.)

In *Paul v. Virginia*, 8 Wallace, 168, this court says with regard to the same section of the constitution (at page 180):

> "It was undoubtedly the object of the

clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. *It relieves them from the disabilities of alienage in other states;* it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; *it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness;* and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this. (Lemmon v. The People, 20 N. Y., 607.)" (Italics ours.)

As Denio, J., says, in *Lemmon v. The People*, 20 N. Y., 562 (which is cited with approval in the above quotation from the opinion of MR. JUSTICE FIELD in *Paul v. Virginia*), with regard to the same section of the Federal Constitution (at page 608):

"The language is that they (the citizens of each state) shall have the privileges and immunities of citizens in the several states. In my opinion the meaning is, that in a given state, every citizen of every other state shall have the same privileges and immunities—that is, the same rights—which the citizens of that state possess. In the first place, they are not to be subjected to any of the disabilities of alienage. They can hold property by the same titles by which every other citizen may hold it, and by no other. Again, *any discriminating legislation which should place them in a worse situation than a proper citizen of the particular state would be unlawful.*" (Italics ours.)

In *Ward v. Maryland*, 12 Wallace, 418, as stated in the head note, a statute of Maryland required all traders resident within the state to take out licenses and to pay therefor certain sums regulated by a sliding scale of from $12 to $150, according as their stock in trade might vary from $1,000 to more than $40,000. The statute also made it a penal offense in any person, not being a permanent resident in the state, to sell, offer for sale, or expose for sale within certain limits in the state, any goods, wares, or merchandise whatever—other than agricultural products and articles manufactured in Maryland within the said limits—either by card, sample or other specimen, or by written or printed trade list or catalogue, whether such person be the maker or manufacturer thereof or not, without first obtaining a license so to do for which license (to be renewed annually) a sum of $300 was to be paid. The plaintiff-in-error, a citizen of the United States and of the State of New Jersey, residing in New Jersey, sold by samples some harness within the prohibited limits of the State of Maryland without any license and contrary to the statute above referred to. He was indicted for the offense against the statute, found guilty and fined, and the judgment of conviction was affirmed in the Court of Appeals of Maryland.

This court held that the judgment of conviction was wrong and should be reversed.

Mr. Justice Clifford, writing for the Court, says (at page 432):

> "Viewed in any light the Court is of the opinion that the statute in question imposes a discriminating tax upon all persons trading in the manner described in the district mentioned in the indictment, who are not permanent residents of the state, and that the

statute is repugnant to the federal constitution, and invalid for that reason."

In the course of his opinion the same learned Justice says with regard to the meaning of "privileges and immunities" as those words are used in article 4, section 2, of the federal constitution (at page 430):

> "Beyond doubt those words are words of very comprehensive meaning but it will be sufficient to say that the clause *plainly and unmistakably secures and protects the right of a citizen of one state to pass into any other state of the Union for the purpose of engaging in lawful commerce, trade or business without molestation;* to acquire personal property; to take and hold real estate; to maintain actions in the courts of the state, and to be exempt from any higher taxes or excises than are imposed by the state upon its own citizens. (Cooley on *Constitutional Limitations,* 16; *Brown v. Maryland,* 12 Wheat., 449.)" (Italics ours.)

II.

Section 14 of the Labor Law in question, prohibiting the employment of alien labor, is in conflict with the provisions of the treaties now existing between many foreign nations and the United States and is therefore void.

I. Origin and Extent of the Treaty-making power of the United States.

Section 8 of Article 1 of the United States Constitution provides, among other things:

"The Congress shall have power. * * *

3. To regulate commerce with foreign nations. * * *

4. To establish a uniform rule of naturalization. * * *

18. To make all laws which are necessary and proper for carrying into execution the foregoing powers."

Section 9 provides that

"The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight; but a tax or duty may be imposed on such importation not exceeding ten dollars for each person."

Section 10, Article I, Clause 1, provides that

"No State shall enter into any treaty, alliance or confederation."

Section 10, Article I, Clause 2, provides that

"No State shall * * * without the consent of the Congress, enter into any agreement or compact with another State or with a foreign power."

Section 2 of Article 6 provides that

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or in the laws of any state to the contrary notwithstanding."

Section 2 of Article 2 provides that

"The president shall have power by and with the advice and consent of the senate to

make treaties, provided two-thirds of the senators present concur."

Section 2 of Article III, Clause 1, provides that

"The judicial powers shall extend to all cases in law and equity arising under this Constitution, the Laws of the United States and treaties made, or which shall be made, under their authority."

"To determine the extent of the grants of power we must, therefore, place ourselves in the position of the men who framed and adopted the Constitution, and inquire what they must have understood to be the meaning and scope of those grounds."

South Carolina v. The United States, 199 U. S., 437.

It may be asserted, without fear of successful challenge, that from the beginning of civilization the right and power to enter into treaties has been recognized and practiced as an essential prerogative of sovereignty. It may also be asserted with equal confidence that the chief cause of the weakness and ultimate extinction of the several nations composed of confederated states, which at different times were established and, after comparatively brief periods, disappeared from the family of nations, was that either the treaty-making power was withheld from the nation and exercised by the constitutent states, or that the nation was given no power to enforce upon the states the observance of treaties negotiated by it.

As pointed out by *Mr. Frank B. Kellogg,* in a most interesting and able address on the treaty-making power before the American Bar Association, at its meeting at Montreal, September 1, 1913:

> "The exercise of the treaty-making power has rarely been left to the individual States collectively constituting a nation. Nor have such States usually been permitted to pass laws violating such treaties. However, individual States and Confederations have retained the treaty-making power. Notable examples of this were the Greek, the Swiss, the North German, and the Netherlands Confederations. The Greek republics perished. The other three governments, finding the confederations disastrous to National unity and prosperity, changed their forms of government, so that the treaty-making power is now vested in the Nation."

Another consideration is, as he pointed out, that "the Federal Government is a government of the people and not of States. Its title springs from the primary authority of all governmental authority, and its treaty-making power is subject to no limitations, except those provided by the Constitution."

All admit that the early statesmen who framed the Federal Constitution were familiar with the history of past confederacies, as well as the chief reasons for their failures.

The almost unlimited extent of the treaty-making power was observed and understood at the time the Federal Constitution was adopted and for a time constituted one of the most serious grounds of opposition to that constitution on the part of many State legislatures. (Butler *Treaty-Making Power,* Volume 1, Section 199 *et seq., Id.* Vol. I, §§207, 208, 209, 210, citing Elliott's *Debates,* Vol. IV; pp. 253 to 340.)

In the Constitutional Convention, assembled at Philadelphia in 1787, and presided over by George Washington, the importance of centralizing the power to enforce treaty stipulations was fully

realized. The attitude of the States with regard to treaties made by Congress under the Articles of Confederation rendered the treaty-making power valueless. The States were constantly acting in direct contravention of treaty stipulations, and particularly in contravention of the stipulations of the treaty with Great Britain which provided for the collection of debts due to British subjects.

By the Articles of Confederation of 1778, it was provided (Article VI.) that

> "No State, without the consent of the United States in Congress assembled, shall send any ambassador to, or receive any embassador from, or enter into any conference, agreement, alliance or treaty with any king, prince or state."

It was further provided by Article IX that

> "The United States, in Congress assembled, shall have the sole and exclusive right and power to determine on peace and war; * * * the sending and receiving of ambassadors—entering into treaties and alliances; provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts or duties on foreigners as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatever."

Under that article, the Congress of the Confederation entered into many treaties defining the status of foreign citizens with the several States, and their right to engage in business, to own, dispose of and inherit property, real and personal, as we point out *infra*.

The question confronting the Convention,

therefore, was not the lack of power on the part of the Confederacy to enter into treaties, because, as we have seen, under the Articles of Confederation there was no limitation or restraint on Congress, except the prohibition against "imposing such imposts or duties on foreigners as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatever."

The chief difficulty arose from the fact that there then existed no federal courts or executive officers clothed with power to enforce treaties. The Articles of Confederation did not make treaties the "supreme law of the land," or superior to State laws.

The chief reason for calling the Convention was to remedy these weaknesses and to confer upon the National Government the exclusive right to enter into treaties and create courts with jurisdiction to enforce them. A reference to the debates and proceedings in the Convention will show that the majority of its members was determined to accomplish those purposes and that no resolution or provision to the contrary ever was supported by a majority vote.

As Mr. Madison early pointed out, the repeated violations of treaties by the States had brought protests from "almost every Nation with which treaties have been formed." He further pointed out that the forbearance of other Nations had hitherto saved the country from the consequences of such violations, but that such forbearance could not be expected to continue. In this connection he said:

> *"It ought, therefore, to be effectually provided that no part of the Nation shall have it in its power to bring them"* (calamities of ruptures with other powers) *"on the whole.*

> The existing Confederacy does not sufficiently provide against this evil." (Italics ours.)

The result of the discussions and deliberations was:

> The provision in Article II of the Constitution giving the President power, "by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur;"
>
> The provision in Article III creating a federal judiciary, to be composed of one supreme court and as many inferior courts as Congress might from time to time ordain and establish, and providing that their jurisdiction should "extend to all cases in law and equity arising under this Constitution or the laws of the United States and treaties made, or which shall be made, under their authority"; and
>
> The provision in Article VI making treaties "the supreme law of the land."

As Butler well says (Vol. I, §194), by the Constitution the treaty-making power was not only lodged in the Central Government, but

> "the States were absolutely prohibited from exercising any treaty-making power or entering into foreign relations of any kind * * * The Convention was also a unit on this point. * * * The treaty-making power was vested in the Central Government without any limitation whatever. * * * That the only restraint placed upon the treaty-making power was as to the method in which a treaty must be made and ratified; and that those restrictions related only to the method of exercising the power, and not to its scope or its sufficiency."

Indeed, by a reference to the Papers of Madison (Madison Papers, Vol. II, p. 742, Vol. III, p.

1408), it appears that from the time the Convention opened until the Constitution took its final form in the report of the Committee on Style the importance and extent of the powers conferred upon the President and the Senate in relation to treaties, were the subject of constant discussion.

CALHOUN, one of the ablest of the champions of "States' Rights," while he was Secretary of State, wrote Mr. Wheaton, who was charged with the negotation of a treaty between the United States and Prussia, with regard to the contention that the President and the Senate lacked "constitutional competency" to include certain clauses in the treaty, as follows:

> "If this be true, however, of the treaty-making power, it may be truly said that its exercise has been one continual series of habitual and uninterrupted infringements of the Constitution. From the beginning and throughout the whole existence of the Federal Government, it has been exercised constantly on commerce, navigation and other delegated powers, to the almost entire exclusion of the reserved powers, which from their nature rarely come into question between us and other nations. The treaty-making power has, indeed, been regarded to be so comprehensive as to embrace, with few exceptions, all questions that can possibly arise between us and other nations and which can only be adjusted by their mutual consent, whether the subject matter be comprised among the delegated or the reserved powers. So far is it from being true * * * that the mere fact of a power being delegated to Congress excludes it from being the subject of treaty stipulation, that even this exclusive delegation, if we may judge from the habitual practice of the Government, does not—of which the

power of appropriating money affords a striking example. It is expressly and exclusively delegated to Congress, and yet scarcely a treaty has been made of any importance which does not stipulate for the payment of money."

(Calhoun to Wheaton, June 28, 1844, MS. Inst., Prussia, XIV, 75.)

The extent of the treaty-making power may, as Calhoun states, be well determined by a study of the instances in which it has been exercised. Prior to the adoption of the Constitution, the Federal Government unhesitatingly entered into treaties containing compacts intended to bind each of the States in the Federation to permit aliens to enjoy, in many instances, almost equal rights with citizens.

Treaty of Amity and Commerce with France, dated 1778—Article XI.

Treaty of Peace and Commerce with Netherlands, dated 1782—Article VI.

Treaty of Peace with Great Britain, dated 1782.

Treaty of Amity and Commerce with Sweden, dated 1783—Article VI.

Treaty of Amity and Commerce with Prussia, dated 1785.

Treaty of Peace and Friendship with Morocco, dated 1787.

The following abstract of the treaty with France, referred to, will show in substance the reciprocal rights provided for in all of them.

Article II is the usual most favored nation clause in respect to commerce and navigation.

Article III provides that French subjects shall

pay no other or greater duties or imposts than those paid by the subjects of the most favored nation and gives them the same rights, privileges and immunities, and exemptions in trade, navigation and commerce as the most favored nation, whether the French subjects are travelling between ports of different states or of the different nations.

Article IV gives the same rights to United States citizens in France.

Article XI allows the citizens of each country exemption from the *droit d'aubaine,* permits them by testament, donation or otherwise to dispose of their real and personal property to anyone and allows their heirs, residing in the other country, to succeed them *ab intestat* without becoming naturalized "and without having the effect of this concession contested or impeded under pretext of any rights or prerogative of provinces, cities or private persons." The same article also exempts such heirs from any duty or *droit detraction,* but provides that any one of the United States may be at liberty to enact laws relative to immigration.

While it will be noted that some of those treaties contain provisions allowing the states to enact laws relative to immigration, it will be observed that Section 9 of Article 8 of the United States Constitution limited this right "to the year one thousand eight hundred and eight" and also provided that "a tax or duty may be imposed on such importation, not exceeding ten dollars per person."

Judge Cooley says in his work on *Constitutional Limitations* (7th ed.), p. 7:

> "When the difficulties with Great Britain culminated in actual war, the Congress of

> 1775 assumed to itself those powers of external control which before had been conceded to the Crown or to the Parliament, together with such other powers of sovereignty as it seemed essential a general government should exercise, and thus became a national government of the United Colonies. By this body war was conducted. independence declared, treaties formed and admiralty jurisdiction exercised. It is evident, therefore, that the States, though declared to be 'sovereign and independent' were never strictly so in their individual character but were always, in respect to the higher powers of sovereignty, subject to the control of a central power and were never separately known as members of the family of nations. The Declaration of Independence made them sovereign and independent states by altogether abolishing the foreign jurisdiction and substituting a national government of their own creation."

In the arraignment of King George by the framers of the Declaration of Independence, is the following:

> "He has endeavored to prevent the population of these states; for that purpose obstructing the laws for naturalization of foreigners; refusing to pass others to encourage their migrations hither and raising the conditions of new appropriations of lands."

In the *Passenger cases*, 7 Howard, 282, decided in 1849, in which statutes of the states of New York and Massachusetts imposing head taxes upon alien passengers arriving in the ports of these states were declared to be contrary to the constitution and the laws of the United States, Mr. Justice McLean *says*, (at page 401):

> "To encourage foreign emigration was a cherished policy of this country at the time

> the Constitution was adopted. As a branch of commerce the transportation of passengers has always given a profitable employmen to our ships, and within a few years past has required an amount of tonnage nearly equal to that of imported merchandise."

We now find assailed rights and policies recognized in the Declaration of Independence and later embodied in the Constitution to encourage immigration to our country, and their value and importance deemed so great as to be one of the chief causes assigned to justify our revolution.

That the signers of the Declaration of Independence, the early statesmen who framed our Constitution and the various states when they ratified it, did not over-estimate the importance of holding out inducements to immigration and the need of it for the purpose of developing the country and its civilization, is strikingly proven by a statement prepared and published by the National Geographical Society, in which it is stated that

> "One person out of every seven in the United States was born outside of our borders. We have to-day 13,500,000 people of foreign birth with us, and nearly all of them are from Europe. They constitute a population approximately equal to the combined populations of Belgium and Holland, or Norway, Sweden, Denmark and Switzerland. * * * In addition to our foreign born population we have nearly 19,000,000 children of immigrants to the United States. * * * Approximately five and a half million people came to the United States to stay during the decade between 1900 and 1910. * * * Taking the immigrant population of the United States and their children, we find that their number totals 32,000,000 for

> 1910, or slightly more than one-third of our entire population. If there be included the grandchildren of immigrants, it appears probable that more than half of the people of the United States are two generations or less removed from alien ancestry, and nearly all of that vast population is of European origin."

It appears from the census of 1910, that the percentage of aliens, resident in the City of New York, is 40.8, or a total of 1,944,357.

When we consider not only the numbers added to our population by immigration, but the services they have contributed to the growth and greatness of the country of which we are so proud, as well as the inducements and guaranties held out to them, and upon which they doubtless relied, of the equal protection of our laws and the same right to the pursuit of life, liberty and happiness that our Constitution pronounces the inalienable right of all persons, every consideration of honor and good faith prevents us from making any such discrimination as is attempted in the prohibition against employment of alien labor contained in §14 of the Labor Law.

2. Decisions of the United States Supreme Court and various Federal Courts upon the subject.

We find, therefore, as might be expected from the foregoing considerations, that our courts have uniformly given the treaty-making power granted to the United States government, and treaties made pursuant thereto, the broadest and most liberal construction to uphold the validity of treaty provisions and to protect the rights of aliens which they assumed to grant.

As Chief Justice Marshall says in *McCulloch v. Maryland* (4 Wheat., 316), (page 407):

> "A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code and could scarcely be embraced by the human mind. It would, probably, never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. * * * We must never forget that it is a *constitution* we are expounding." (Italics ours.)

And as the same Chief Justice says in *Gibbons v. Ogden* (9 Wheat., 213):

> "The grant of the privilege is an idle, empty form, conveying nothing, unless it convey the right to which the privilege is attached and in the exercise of which its whole value consists."

In the case of the *Society for the Propagation of the Gospel, etc. v. New Haven* (8 Wheat., 464), it was held that, notwithstanding the outcome of the Revolution, the property of British corporations in this country are protected by the Sixth article of the Treaty of Peace of 1783, in the same manner as that of natural persons; that their title thus protected was confirmed by the ninth article of the Treaty of 1794, so that it could not be forfeited by any intermediate act or other proceeding for the defect of alienage.

The case of *United States v. Rauscher* (119 U. S., 407), arose under the extradition treaty with Great Britian. In delivering the opinion of the court Mr. Justice Miller cites with approval the

language of CHIEF JUSTICE MARSHALL in *Foster v. Nelson*, 2 Peters, 253, 314:

> "Our Constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the legislature whenever it operates of itself without the aid of any legislative provision."

In the *Head Money Case*, 112 U. S., 580, at p. 598, the effect of a treaty as a part of the law of the land as distinguished from its aspect as a mere contract between independent nations is expressed by MR. JUSTICE MILLER in the following language:

> "An illustration of this character is found in treaties, which regulate the mutual rights of citizens and subjects of the contracting nations in regard to the rights of property by descent or inheritance, when the individuals concerned are aliens. The Constitution of the United States places such provisions as these in the same category as other laws of Congress by its declaration that this constitution and the laws made in pursuance thereof and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land."

In *Moore's International Law Digest* (Vol. 5, p. 566), it is said:

> "A treaty is primarily a compact between independent nations, and depends for the enforcement of its provisions on the honor and the interests of the governments which are parties to it. If these fail, its infraction becomes the subject of international reclamation and negotiation, which may lead to war to enforce them. With this judicial tribunals have nothing to do."

Even a breach of a treaty by one party to it does not destroy its binding force as a compact

unless the other party consents to its abrogation or deems such breach a justification for its withdrawal therefrom.

The consent and determination to effect an abrogation of a treaty, notwithstanding its provisions have been violated by the other party, requires formal governmental action.

> *Charlton v. Kelly*, 229 U. S., 447;
> *Vattel*, p. 452;
> *In re Thomas*, 12 Blatchf., 370;
> *Terlinden v. Ames*, 184 U. S., 270.

It is also held (See *Charlton* case) that the construction of a treaty by the political part of the government, while not conclusive upon the courts in a matter involving personal rights, is nevertheless of great weight.

It is said in the case of *Baldwin v. Franke* (120 U. S., 678, pp. 682-3):

> "That the treaty making power has been surrendered by the states and given to the United States is unquestionable. It is true also that the treaties made by the United States and in force are a part of the supreme law of the land and they are as binding within the territorial limits of the states as they are elsewhere throughout the dominion of the United States."

The treaty with the Kingdom of Italy provides among other things as follows:

> "ARTICLE III.
>
> The citizens of each of the high contracting parties shall receive, in the States and Territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or shall

be granted to the natives, on their submitting themselves to the conditions imposed upon the natives."

In 1913, this clause was amended to read:

> "The citizens of each of the High Contracting parties shall receive in the States and Territories of the other the most constant security and protection for their persons and property and for their rights, including that form of protection granted by any State or national law which establishes a civil responsibility for injuries or for death caused by negligence or fault and gives to relatives or heirs of the injured party a right of action, which right shall not be restricted on account of the nationality of said relatives or heirs; and shall enjoy in this respect the same rights and privileges as are or shall be granted to nationals, provided that they submit themselves to the conditions imposed on the latter."

The court will take judicial notice that we have treaty relations with the leading nations of the world, which usually in addition to defining more or less in detail the rights of citizens of a foreign country which may be enjoyed here, define the reciprocal rights which our citizens may enjoy in such country. (See Appendix for list of such treaties). We refer to only one more such treaty here, namely, the treaty between our government and that of China, concluded November 17, 1880. (22 Stat., 827.) We refer to this treaty particularly because of the fact that it has recently been construed by the Supreme Court of the United States, as showing the protection it affords to Chinese subjects or citizens in this country, as well as the limitations of power on the part of our state legislatures to legislate

regarding them. The essential provision reads as follows:

> "If Chinese laborers or Chinese of any other class now either permanently or temporarily residing in the territory of the United States meet with ill treatment at the hands of any other persons, the Government of the United States will exert all its powers to devise measures for their protection and to secure to them the same rights, privileges, immunities and exemptions as may be enjoyed by the citizens or subjects of the most favored nation."

The effect of treaty provisions and the extent of their protection of the rights of aliens resident in this country, have many times been before the courts.

In the case of *Yick Wo v. Hopkins,* 118 U. S., 356, it appeared that the plaintiff was arrested for violation of a city ordinance regulating the carrying on of public laundries within the limits of a municipality in California. The Constitution of the State of California, Art. XI, Sec. 2, provided that

> "Any county, city, town or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with the general laws."

The Legislature by statute (Act of Apr. 19, 1876, Sec. 74), gave the Board of Supervisors power among other things

> "To provide by regulation for the prevention and summary removal of nuisances to public health, the prevention of contagious disease * * * to prohibit the erection of wooden buildings within any fixed limits * * *

> to regulate the storage and use of gunpowder or other explosives * * * to make all needful regulations for protection against fire; to make such regulations concerning the erection and use of buildings as may be necessary for the safety of the inhabitants."

The ordinance passed by the Board of Supervisors in substance provided that it should be unlawful for any person or persons

> "To establish, maintain or carry on a laundry within the corporate limits of the city or county of San Francisco without having first obtained the consent of the Board of Supervisors, except the same was located in a building constructed either of brick or stone."

Under this ordinance the Board of Supervisors refused consent to the plaintiff and many of his fellow countrymen to prosecute the laundry business because the business was carried on in buildings not of the character specified in the ordinance, although they gave consent to others similarly situated to prosecute such business which was being conducted in buildings of the character described. Plaintiff, who was engaged in business at the time the ordinance was passed, continued it, was arrested for violation of the ordinance, convicted and imprisoned. His conviction was upheld by the Supreme Court of the State of California but, in this court the conviction was reversed and the plaintiff ordered discharged on the ground that the ordinance was arbitrary and discriminated between Chinese subjects and others in their right to conduct the same kind of business.

This court not only held the ordinance null and void as repugnant to the Fourteenth

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Amendment of the Constitution, as pointed out in Point I (*supra*), but also as in violation of the provisions of the treaty with China above quoted. It is said (page 368):

> "The rights of the petitioners as affected by the proceedings of which they complain, are not less because they are aliens and subjects of the Emperor of China. By the Third Article of the treaty between this government and that of China, concluded November 17, 1880 (22 Stat., 827), it is stipulated" (quoting the provisions of the treaty above referred to in said point).

In the case of *Hauenstein v. Lynhan*, 100 U. S., 483, it appeared that a citizen of Switzerland died in 1861 in Virginia intestate and without issue. For want of an heir capable under the statutes of the state to inherit the lands there situate, whereof he died seized in fee, they were sold by the escheator of the proper district. A's next of kin, B, a citizen of Switzerland, filed a petition to recover the proceeds of that sale. Upon consideration of the treaty between the United States and the Swiss Confederation of November 25, 1850 (10 Stat., 587), this court held:

1. That the treaty is the supreme law of the land and by its terms the incapacity of B as an alien was so far removed as to entitle him to sell the lands and "withdraw and export the proceeds thereof." • • •

2. That where a treaty admits of two constructions—one restrictive as to the rights that may be claimed under it and the other liberal—the latter is to be preferred.

3. That the treaty-making clause of the Constitution is retroactive as well as prospective.

It is conceded in that case that by the common law of Virginia "aliens are incapable of taking by descent or inheritance, for they are not allowed to have any inheritable blood in them."

It is said on page 484:

> "The law of nations recognizes the liberty of every government to give to foreigners only such rights, touching *immovable* property within its territory as it may see fit to concede. Vattel, book 2, c. 8, sect. 114. In our country, this authority is primarily *in the States where the property is situated.*" (Italics ours.)

The court after pointing out that the Revised Code had not relieved aliens of any disabilities imposed by the common law, says (at page 485):

> "This brings us to the consideration of the treaty between the United States and the Swiss Confederation of the 25th of November, 1850, 11 Stat., 587. The fifth article has been earnestly pressed upon our attention, and is the hinge of the controversy between the parties.
>
> "The first part of the article is devoted to personal property, and gives to the citizens of each country the fullest power touching such property belonging to them in the other, including the power to dispose of it as the owner may think proper. It then proceeds as follows:
>
> " 'The foregoing provisions shall be applicable to real estate situate within the 'States of the American Union, or within 'the cantons of the Swiss Confederation, in 'which foreigners shall be entitled to hold or 'inherit real estate.
>
> 'But in case real estate situated within 'the territories of one of the contracting parties should fall to a citizen of the other 'party, who, on account of his being an alien,

'could not be permitted to hold such prop-
'erty in the State or in the canton in which
'it may be situated, there shall be accorded
'to the said heir, or other successor, such
'term as the laws of the State or canton
'will permit to sell such property; he shall
'be at liberty at all times to withdraw and
'export the proceeds thereof without diffi-
'culty, and without paying to the government
'any other charges than those which, in a
'similar case, would be paid by an inhabitant
'of the country in which the real estate may
'be situated.'

"The plaintiffs in error are exactly within the latter category. This is too clear to require discussion."

It points out that a prior treaty of May, 1847, had corresponding provisions and that the same rights were insured under the provisions of that treaty. It then says (at page 488):

"The efficacy of the treaty is declared and guaranteed by the Constitution of the United States. That instrument took effect on the fourth day of March, 1789. In 1796, but a few years later, this court said: 'If doubts 'could exist before the adoption of the pres-'ent national government, they must be en-'tirely removed by the sixth article of the 'Constitution, which provides that "all ' "treaties made or which shall be made un-' "der the authority of the United States, ' "shall be *the supreme law of the land*. and ' "the judges in every state shall be bound ' "thereby, anything in the Constitution or ' "laws of any State to the contrary notwith-' "standing." There can be no limitation 'on the power of the people of the United 'States. By their authority the State Con-'stitutions were made, and by their authority 'the Constitution of the United States was 'established; and they had the power to

'change or abolish the State Constitutions or 'to make them yield to the general govern- 'ment and to treaties made by their au- 'thority. A treaty cannot be *the supreme 'law of the land,* that is, of all the United 'States, *if any act of a State Legislature* 'can stand in its way. If the Constitution 'of a State (which is the fundamental law of 'the State and paramount to its legislature) 'must give way to a treaty and fall before it, 'can it be questioned whether the less power, 'an act of the State legislature, must not be 'prostrate. It is the declared will of the 'people of the United States that every 'treaty made by the authority of the United 'States shall be superior to the Constitution 'and laws of any individual State, and their 'will alone is to decide. If a law of a State 'contrary to a treaty is not void, but voidable 'only, by a repeal or nullification by a State 'legislature, this certain consequence fol- 'lows,—that the will of a small part of the 'United States may control or defeat the 'will of the whole.' (*Ware v. Hylton,* 3 Dall., 199.)

"It will be observed that the treaty-making clause is retroactive as well as prospective. The treaty in question, in *Ware v. Hylton,* was the British treaty of 1783, which terminated the war of the American Revolution. It was made while the Articles of Confederation subsisted. The Constitution, when adopted, applied alike to treaties 'made and to be made.' * * *

"In *Chirac v. Chirac* (2 Wheat., 259), it was held by this court that a treaty with France gave to her citizens the right to purchase and hold land in the United States, removed the incapacity of alienage and placed them in precisely the same situation as if they had been citizens of this country. The State law was hardly adverted to, and seems not to have been considered a factor of any importance in this view of the case.

The same doctrine was reaffirmed touching this treaty in *Carneal v. Banks* (10 id., 181), and with respect to the British treaty in 1794, in *Hughes v. Edwards* (9 id., 489). A treaty stipulation may be effectual to protect the land of an alien from forfeiture by escheat under the laws of a State. (*Orr v. Hodgeson*, 4 *id.*, 453.) By the British treaty of 1794, 'all impediment of alienage was absolutely 'levelled with the ground despite the laws of 'the States. It is the direct constitutional 'question in its fullest conditions. Yet the 'Supreme Court held that the stipulation 'was within the constitutional powers of the 'Union.' (*Fairfax's Devisees v. Hunter's 'Lessee*, 7 Cranch., 627; see *Ware v. Hylton*, '3 Dall., 242. 8 Op. Atty's Gen., 417.)' Mr. Calhoun, after laying down certain exceptions and qualifications which do not affect this case, says: 'Within these limits all 'questions which may arise between us and 'other powers, be the subject matter what it 'may, fall within the treaty-making power 'and may be adjusted by it.' (*Treat. on the Const. and Gov. of the U. S.*, 204.)

"If the national government has not the powers to do what is done by such treaties, it cannot be done at all, for the States are expressly forbidden to 'enter into any treaty, alliance or confederation.' (Const., art. 1, sec. 10.)

"It must always be borne in mind that the Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution. This is a fundamental principle in our system of complex national polity. (See also *Shanks v. Dupont*, 3 Pet., 242; *Foster & Elam v. Neilson*, 2 id., 253; *The Cherokee Tobacco*, 11 Wall., 616; *Mr. Pinkney's Speech*, 3 *Elliot's Constitutional Debates*, 231; *The People, &c. v. Gerke & Clarke*, 5 *Cal.*, 381.)

"We have no doubt that this treaty is within the treaty-making power conferred by

the Constitution. And it is our duty to give it full effect." (Italics ours.)

In the case of *Geofroy v. Riggs*, 133 U. S., 258, the effect of a treaty between France and the United States upon the right of a citizen of France to take land in the District of Columbia by descent was considered. It was held, as stated in the head note, that the treaty-making powers of the United States extended to the protection to be afforded to citizens of a foreign country owning property in this country and to the manner in which that property may be transferred, devised or inherited. This involved a consideration of the effect of Article 7 of the Convention with France of September 30, 1800, and of Article 7 of the Consular Convention with France of February 23, 1853.

In its opinion the court says, pp. 266-267:

"That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations is clear. It is also clear that the protection which should be afforded to the citizens of one country owning property in another, and the manner in which that property may be transferred, devised or inherited, are fitting subjects for such negotiation and of regulation by mutual stipulations between the two countries. As commercial intercourse increases between different countries the residence of citizens of one country within the territory of the other naturally follows and the removal of their disability from alienage to hold, transfer and inherit property in such cases tends to promote amicable relations. Such removal has been within the present century the frequent subject of treaty arrangement. The treaty power, as expressed in the Con-

> stitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States or a cession of any portion of the territory of the latter, without its consent. *Fort Leavenworth Railroad Co. v. Lowe*, 114 U. S., 525, 541. But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country. (*Ware v. Hylton*, 3 Dall., 199; *Chirac v. Chirac*, 2 Wheat., 259; *Hauenstein v. Lynham*, 100 U. S., 483, 8 *Opinions Attys. Gen.*, 417; *The People v. Gerke*, 5 California, 381.)"

In *Re Tiburcio Parrott* (1880), 1 Fed., 481, the question before the court was the validity of a provision of a statute enacted pursuant to the California constitution which prohibited the employment of Chinese by corporation and authorized the legislature to pass the laws necessary to render the prohibition effective.

A statute was accordingly enacted making employment of Chinese by corporations a crime and providing for the arrest and punishment of officers of the guilty corporation.

Article VI of the treaty with China (1868) provided that

> "Chinese subjects residing in the United States shall enjoy the same privileges, immunities and exemptions in respect to travel and residence as may there be enjoyed by

citizens or subjects of the most favored nation."

The president of a corporation was arrested for violation of the above statute, sued out a writ of habeas corpus and sought to sustain the writ on the ground that the statute was unconstitutional.

The court held that the statute was unconstitutional, being in conflict with the treaty and with the Fourteenth Amendment of the Constitution of the United States.

The Court said at p. 498:

> "No enumeration would, I think, be attempted of the privileges, immunities, and exemptions of the most favored nation, or even of man in civilized society, which would exclude the right to labor for a living. It is as inviolable as the right of property, for property is the offspring of labor."

At p. 501:

> "The states have surrendered the treaty-making power to the general government, and vested it in the president and senate; and, when duly exercised by the president and senate, the treaty resulting is the *supreme* law of the land, to which not only state laws but *state constitutions* are in express terms subordinated." * * *

At p. 507:

> "The Chinese have a perfect right, under the stipulations of the treaty, to reside in the state, and enjoy all privileges, immunities, and exemptions that may there be enjoyed by the citizens and subjects of any other nation; and, under the fourteenth amendment to the national constitution, the right to enjoy 'life, liberty and property,' and 'the equal protection of the laws,' in the same degree and to the same extent as these rights are en-

joyed by our own citizens; and in the language of MR. JUSTICE BRADLEY, in the *Slaughter-house Cases, 'the whole power of the nation is pledged to sustain those rights.'* To persist, on the part of the state, in legislation in direct violation of these treaty stipulations, and of the constitution of the United States, and in endeavoring to enforce such void legislation, is to waste effort in a barren field, which, if expended in the proper direction, might produce valuable fruit; and, besides it is little short of incipient rebellion."

In the case of *Baker v. Portland*, 2 Fed. Cas., 472; 5 Sawyer, 566, three propositions were decided, as follows:

1. That the State has no power to interfere with or in any way limit the operation of a treaty of the United States.

2. That it will be admitted that a State has general power to say who it will employ or who its contractor shall employ; still the state being a member of the Union and subordinate in the exercise of its general powers to the Constitution of the United States and the laws and treaties made in pursuance thereof, it cannot exercise its power in any case where it conflicts with the operation of such constitution, laws or treaties.

3. That a legislative act of the State of Oregon which prohibited the employment by contractors of Chinese upon street improvements or public works but permitted other aliens to be so employed, was in conflict with the treaty between the United States and the emperor of China, which secured to the Chinese resident here the same right to be employed and to labor for a living as the subjects of any other nation, and was therefore void.

It is settled that the right of immigration of foreigners to this country, the right to acquire citizenship by naturalization, as well as their rights prior to the acquisition of citizenship, and the privileges and immunities attaching to their status, are wholly under the control of Congress.

In the *License Tax* case, DANIEL WEBSTER said:

> "The powers of the State and the powers of Congress do not stand upon equal sovereignty. The acts of Congress passed within the constitutional power of Congress are the supreme law. There can be no conflict. The State must recede."

In the case of *Live Stock Association v. Crescent City Co.* (1 Abb. U. S., 388, 389), the presiding justice states:

> "There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more or less than the sacred right of labor."
>
> • • • "The rights of the petitioners, as affected by the proceedings of which they complain are not less because they are aliens and subjects of the Emperor of China. By the third article of the treaty between this Government and that of China, concluded November 17, 1880 (22 Stat., 827), it is stipulated: 'If Chinese laborers, Chinese 'of any other class, now either permanently 'or temporarily residing in the territory of 'the United States, meet with ill treatment 'at the hands of any other persons, the Gov-'ernment of the United States will exert all 'its power to devise measures for their pro-'tection, and to secure to them the same 'rights, privileges, immunities, and exemp-'tions as may be enjoyed by the citizens or 'subjects of the *most favored nation*, and to 'which they are entitled by treaty.'" (Italics ours.)

In *Robbins v. Shelby Taxing District,* 120 U. S., 489, 493, it is said:

> "Another established doctrine of the court is, that where the power of Congress to regulate is exclusive, the failure of Congress to make express regulations indicates its will that the subject *shall be left free from any restrictions or impositions;* and any regulation of the subject by the states, except in matters of local concern only, as hereinafter mentioned, is repugnant to such freedom." (Italics ours.)

The matters referred to by the court as excepted relate to the exercise of the police power of the state.

3. A REFERENCE TO THE DECISIONS OF THE COURTS OF THE VARIOUS STATES SHOWS THAT THEY, WITH EQUAL EMPHASIS, DECLARED THE SUPREMACY OF TREATY STIPULATIONS, AND UNIFORMLY HELD STATUTES AND CONSTITUTIONAL PROVISIONS INCONSISTENT THEREWITH TO BE INVALID IN EVERY CASE WHERE THE QUESTION WAS PROPERLY PRESENTED.

It is gratifying to us to be able to refer to, as one of the first, a decision made in the State of New York, in 1784. That is the case of *Rutgers v. Waddington,* decided in the Mayor's Court of New York.

A New York Statute was passed February 26, 1783 (Session Laws, 1783—Original Edition, 283-284), entitled:

> "A bill for granting speedy relief in case of certain trespass,"

which provided that,

> "It shall and may be lawful for any person or persons, who are, or were inhabitants o

> this state and who, by reason of the invasion of the enemy, left his, her or their place of abode * * * to bring an action of trespass against any person or persons who may have occupied, injured or destroyed his, her or their estate, either real or personal, within the power of the enemy. * * * No defendant or defendants shall be admitted to plead in justification any military order or command whatsoever, of the enemy for such occupancy."

In 1776, plaintiff, the owner of a certain brewery in New York City, left the city at the time of its occupancy by the British Army. From 1778 to 1780 defendant occupied the brewery under permission given by the Commissary-General of the British Army. From 1780 to 1783 defendant occupied the premises under a license granted by Sir Henry Clinton, Commander in Chief of the British Army. After the war plaintiff re-entered the city and regained possession of the brewery and sued defendant for damages for the trespass during the above mentioned periods.

Defendant pleaded that he was a subject of Great Britain; that he occupied the premises by virtue of the above mentioned permission; that under the treaty of peace of September 3, 1783, with Great Britain all right and claims, which either of the contracting parties or their subjects might have to any compensation, for or by reason of any injury, which either of the contracting parties and subjects might have done to the other, in consequence of, or in any wise relating to, the war, were mutually renounced and released to the other. There was a replication that the statute specifically provides that no defendant shall be permitted to plead any military order or license as an excuse for this trespass. Demurrer to replication was filed and issue joined thereon.

The demurrer was argued February 29, 1784, before James Duane, Mayor, and Richard Varick, Recorder of the City, and certain Aldermen. The plaintiff was represented by several of the leading lawyers of the day, including the Attorney General of the State, who sought to support the statute. The argument in behalf of the defendant was also made by leading counsel, including Alexander Hamilton.

It may be noted here that Mayor Duane was later Federal Judge of the District of New York.

In a very able opinion written by Mayor Duane, it is pointed out that, in dealing with foreign powers, we deal in a national capacity, and the various states exercise a "joint sovereignty."

It is further pointed out that the several states could be known abroad only "in their "federal capacity" and that nothing but confusion would result "if each separate State should "arrogate to itself a right of changing at pleas- "ure those laws which are reserved as a rule of "conduct by the common consent of the greatest "part of the civilized world."

Referring to the provisions of the Treaty of Peace entered into with England, it is said (p. 38.)

> "It has been further objected that Congress should form no treaty of peace to reach our *internal* police," etc. * * * "The federal compact hath vested Congress with full and exclusive powers to make peace and war. This treaty they have ratified and rendered its obligation perpetual.
>
> "And we are clearly of opinion, that no state in this Union can alter or abridge, in a single point, the federal articles of the treaty."

The report, which includes this single case, is

somewhat rare and the author in giving the history of it, points out that the decision caused great excitement and, at a mass meeting shortly thereafter held, a committee was appointed to protest against it; also that an article appeared in "The New York Packet and American Advertiser" of September 6, 1784, declaring that it was "an assumption of power in the judiciary "which threatened the liberties of the people."

Later, the following resolution was defeated in the Assembly of the state:

> "That it be recommended to the Honorable The Council of Appointment, to appoint such persons to be Mayor and Recorder of New York as will govern themselves by the known law of the land." (See Journal of the Assembly—Original Edition, 22.)

Notwithstanding this opposition and the criticism the decision aroused, Hamilton later defended it in the Federalist, and so successfully maintained the principle of it, that the New York legislature ratified the constitution containing the treaty-making power as broad as the principle asserted in the decision.

It is interesting to note also that the question raised in that case that "Congress should "form no treaty of peace to reach our internal "police," etc., was never thereafter raised or discussed until after 1840, when, apparently, it was urged and somewhat discussed in the following cases:

> *Holmes v. Jennison*, 14 Peters, 540;
> *License Cases*, 5 Howard, 504;
> *Passenger Cases*, 7 Howard, 283.

While there are some statements contained in some of the opinions in those cases in support of

the doctrine that the treaty-making power did not extend to such of the internal affairs of a state as Congress was without power to regulate or legislate in regard to, yet these statements were not necessary to the decision, nor did they receive the support of the majority of the court in any of the cases. Since the last of these cases the distinction or limitation thus sought to be made seems not to have been referred to and was evidently abandoned as unsound.

In *Succession of Dufor* (1855), 10 La. Ann., 391, a French citizen had died in Alabama, leaving bank stock in Louisiana. A statute in Louisiana placed a succession tax of 10% on persons not domiciled in Louisiana and not citizens of the United States. This tax was resisted by the distributees of the decedent who were French subjects, resident in France. They based their contention on the 7th article of the treaty of 1853, which exempts the citizens of each country from paying any greater tax or impost upon succession devolving to them, than citizens of the country in which the succession is opened, are required to pay.

This court held that this exemption applies; that the provision of the treaty was within the constitutional power of the President and Senate of the United States; that the provision being constitutionally valid, must be obeyed as the supreme law; that consequently the statute of Louisiana became *pro tanto* inoperative during the continuance of the said treaty.

In *Yeakens Heirs v. Yeakens Heirs* (1862), 4 Met. (Ky.), 33, a naturalized citizen of Kentucky had died in 1853, leaving realty in that State. His widow was an American citizen but all his kindred were Swiss subjects. They in 1859 brought action for a sale and distribution

of the estate. Under the laws of Kentucky an alien could not inherit land. Under the treaty with Switzerland, where alienage disqualified an heir who was a Swiss subject, that subject was allowed *a term of three years* to dispose of the property and withdraw the proceeds free from taxes. In the court below, judgment had gone against the Swiss subjects.

The court held that the Swiss claimants were precluded from the interest claimed by lapse of time, and says (at p. 38):

> "To the extent of its conflict with said treaty it (the state law) must give way, because, by the constitutional provision, the treaty is regarded as paramount to the state law. The law of the state refuses all rights to appellants at any and all times; the treaty, however, invests them with an interest, provided it is asserted within a period of three years after the right accrues; or rather it forbids any law limitating their right of recovery to less than three years, the effect of which is to permit any restriction by state legislation against such recovery, which will not interfere with the right for that period. The state law was, therefore, so affected by the treaty as to become inoperative for a period of three years, but no further—it being a well-settled rule that when a State law is deemed unconstitutional, because opposed to the constitution, laws, and treaties of the federal government, it is only void so far as it contravenes the constitution, laws or treaties. Beyond the three years, the period within which foreigners may claim such interest, there is no contravention because there is nothing forbidding the state legislation which denies the right to that class of persons after that time."

In *Amat's Succession* (1866), 18 La. Ann., 403, the state sued for succession tax on the estate of

a French subject who had died in Louisiana and whose heir was a citizen of France. The latter's defense was the 7th Article of the treaty of 1853 which provided that

> "in all the States of the Union whose laws permit it, so long and to the same extent as the said laws shall remain in force, Frenchmen shall enjoy the right of possessing personal and real property, by the same title and in the same manner as the citizens of the United States; they shall be free to dispose of it and in no case shall they be subjected to taxes on transfers, inheritance or any others, different from those paid by the latter, or to taxes which shall be equally imposed."

The court held with the defendant that under the treaty French citizens could not be subjected to greater or different taxes on inheritance than those imposed on United States citizens.

In *Succession of Crusius* (1867), 19 La. Ann. 369, the state sued for succession tax on the estate of a citizen of Louisiana whose heirs were subjects of Bavaria. The court held that the Louisiana succession tax did not apply to them, because of the treaty of 1845 with Bavaria, providing that when a citizen of one country died, holding real property, which would, by the laws of the land, descend to a citizen or subject of the other, were he not disqualified by alienage, a term of two years should be allowed for the sale of the same and the withdrawal of the proceeds, exempt from duties of detraction.

In *Wunderle v. Wunderle* (1893), 33 N. E. (Ill.) 195, an action in partition was brought by a nonresident heir, subject of one of the states of the German Empire with which no treaty had been made.

A statute of Illinois prohibited non-resident aliens from inheriting land. The court held that the plaintiff had no interest in the land claimed; even though the statute was invalid in so far as it applied to non-resident aliens protected by a treaty.

It says (at p. 197):

> "While it is true that 'the right of foreigners to hold title to real estate is entirely dependent on the laws of the state in which the land is situate' (2 Whart. Int. Law Dig., p. 490, Sec. 201), it is also true that the state law must give way if it conflicts with any existing treaty between the government of the United States and the government of the country of which such foreigner is a subject or citizen. Article 6 of the Federal Constitution provides that 'all treaties made or which shall be made, under the authority of the United States shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.' In construing this article it has been held that provisions in regard to the transfer, devise or inheritance of property are fitting subjects of negotiation and regulation by the treaty making power of the United States and that a treaty will control or suspend the statutes of the individual states whenever it differs from them. Hence, if the citizen or subject of a foreign government is disqualified under the laws of a state from taking, holding or transferring real property, such disqualification will be removed if a treaty between the United States and such foreign government confers the right to take, hold or transfer real property."

In *Opel v. Shoup*, 100 Iowa, 407, the next of kin of an intestate resident of Iowa was a mother who was an alien, resident in Germany. After

her death, plaintiff, claiming through her, brought action in equity "to determine the interest of the several parties." Defendants contended that plaintiff's mother had no inheritance because of the statutory disqualification of aliens.

The treaty with Bavaria (1845), provided:

Article I—"Every kind of droit d'auaine, droit de retraite, and droit de detraction or tax on emigration, is hereby and shall remain, abolished between the two contracting parties, their states, citizens and subjects, respectively."

Article II—"When a person holding real estate in one country dies and such real estate would descend on a citizen or subject of the other country, were he not disqualified by alienage, such citizen is allowed two years to sell the same and withdraw the proceeds, exempt from detraction."

Article III gives citizens of each country the right to dispose of their real property in the other country by will, and to their heirs or legatees, the right to succeed to take possession and dispose of the same, paying such duties only as inhabitants pay.

The court held that plaintiff inherited an interest in the land through his alien mother; that the state law was in conflict with the treaty and "reason and the authorities support the conclusion that the treaty must control"

In *Succession of Ravassee* (1895), 47 La Ann., 1454, a French citizen had died intestate in New Orleans; two of his heirs were French citizens resident in France. In the succession actions a delegate of the French consul claimed to represent these heirs by virtue of a treaty which provides that on the death of any citizen of either country in the other, without any executor by him ap-

pointed, the consul shall have the right to appear personally or by delegate, in all proceedings on behalf of the absent or minor heirs. In Louisiana the court was allowed by statute to appoint an attorney for absent heirs and had done so in this case.

The court held that the heirs were properly represented by the consul; that they were not "absent" and the court could not appoint an attorney but must recognize the consul's delegate.

The court says:

> "It is idle to call in question the competency of the treaty-making power, nor do we think any question can be raised that the subject of this treaty under discussion here is properly within the scope of the power. That subject is the right of French subjects to be represented here by the consul of their country. On that subject the treaty provision is plain. The treaty by the organic law is the supreme law of the land, binding all courts, State and Federal. (*Constitution United States*, Art. 6, par. 2; I *Kent's Commentaries*, 165; *Ware v. Hylton*, 3 Dallas, 197; 19 How., 1; 100 U. S., 483, 488; 133 U. S., 264, 266; *Treaty with France*, 1853, 10 *Stats.*, 999, Sec. 12; *Treaty with Belgium*, 1880, Art. XV.)"

In *Succession of Rixner* (1896), 48 La. Ann., 553, an Italian subject had succeeded to real estate in Louisiana. An attempt was made to impose a 10% succession tax on him as a nonresident alien. The Italian treaty contained a provision that as to real property the citizens and subjects of the two parties should be treated on the footing of the most favored nation.

The court held that the succession was not taxable.

In *Tellefsen v. Fee* (1897), 168 Mass., 188, the

action was against a constable for false imprisonment. Plaintiff was captain of a Norwegian ship laying up in Boston Harbor. As captain he was sued by a member of the crew for wages and a writ authorizing his arrest was sued out. On this writ defendant sought to justify the arrest.

The treaty between United States and Norway and Sweden of 1827 contained a provision whereby the consuls have the right to sit as judges in such differences as may arise between the captains and crews of the vessels of the nation whose interests are committed to their charge, without the interference of the local authorities, unless the conduct of the crew or captain should disturb the order or tranquility of the country.

The court held that under this treaty the Municipal Court of the City of Boston had no jurisdiction of the action for wages brought against the captain, that the Swedish consul had exclusive jurisdiction, and the writ relied on by defendants did not justify the arrest.

In *Bahuaud v. Bize* (1901), 105 Fed., 485, the action was partition. A citizen of Nebraska had died leaving realty in that State. Non-resident citizens of France claimed it. A Nebraska statute provided that non-resident aliens could not take real estate by descent. The Nebraska constitution provided (Sect. 25, Art. I):

> "No distinction shall ever be made by law between resident aliens and citizens in reference to the possession or descent of property."

The treaty with France of 1853 provides in effect that in all the states of the Union whose existing laws permit it, so long and to the same extent as the said laws shall remain in force, Frenchmen shall enjoy the same right of acquir-

ing real and personal property by the same title and in the same manner as citizens of the United States, and that they shall be free to dispose of it as they please, by donation, testament or otherwise, just as citizens themselves.

The court held that the treaty removes the disability of alienage of non-residents, where legislation permits resident aliens to acquire real estate; that it is not an open question that the United States has power to make treaties removing the disability of aliens to inherit; that such treaties are a valid exercise of and within the powers conferred by the Constitution of the United States; and that since the Constitution of Nebraska allows resident aliens to acquire real estate, the disability of non-resident aliens is removed by the treaty.

In *Dockstader v. Roe* (Delaware, 1903), 55 Atlantic, 341, the action was ejectment.

A citizen of Delaware had died intestate leaving real property in that state. The plaintiff claimed under conveyance by three aliens, residents and subjects of Great Britain. The claimant in possession was an alien resident of Pennsylvania and based his claim upon a statute in Delaware allowing aliens, resident in the United States, to take land by virtue of the intestate law of Delaware but providing also that

> "any kindred, being aliens and not residing within the limits of the United States, at the time of the intestate's death, shall be passed by, and the effect shall be the same as if they were dead."

It was contended by plaintiff that this statute was in conflict with Article I of the treaty with Great Britain of 1900 which provides:

> "Where on the death of any person hold-

> ing real property within the territories of one of the contracting parties, such real property by the laws of the land pass to a citizen or subject of the other, were he not disqualified by the laws of the country where such real property is situated, such citizen or subject shall be allowed a term of three years in which to sell the same."

The court held that the residents and subjects of Great Britain were entitled to inherit; that the treaty is paramount and its obscure language, as interpreted by the court, contemplates the elimination of the disqualification of alienage.

In *Lehman v. Miller* (1900), 88 N. E. (Ind. App.), 365, the action was to enforce an escheat.

An Indiana Statute provided that aliens could take and hold land by devise or descent only, but must convey within five years to avoid escheat. A citizen of Indiana died intestate leaving real estate. His heirs at law were citizens of Switzerland. More than five years having elapsed without a conveyance, the state claims the land.

The treaty of 1850 with Switzerland provides for the inheritance of real estate by Swiss subjects in states in which aliens are entitled to hold real estate and in other states allows Swiss subjects to dispose of property which, but for their alienage, they would inherit.

The court held that this provision of the treaty in regard to the power of disposition bound the separate states but that the statute was effective in preventing aliens from "holding" real property.

It says (at p. 367):

> "Treaties are a part of the supreme law of the land. State law must give way to treaties made by the federal government. (*Lewis Sutherland, Stat. Const.* Sec. 22, p. 28; *Blythe v. Hinckley,* 127 Cal. 431, 59 Pac.

787; *Adams v. Akerland*, 168 Ill., 632, 48 N. E. 454; *Scharpf v. Schmidt*, 172 Ill. 255, 50 N. E. 182.) Subject to the provisions of the organic law of the state, if any, relating thereto and the constitution, laws, and treaties of the United States, the state, through its General Assembly, has full power to regulate the law of descent, and to determine whether aliens shall be permitted to hold real estate, and, if so, to what extent and under what circumstances.

"The question in this cause is whether the statute in question is in conflict with the treaty of 1850, between the United States and the Swiss Confederation. We think it is firmly settled, *except in so far as limitations have been placed on the inherent sovereignty of the States by treaty*, that the state may deny aliens the privilege of inheriting lands and it follows that, when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy."

In *Re Stixrud* (1910), 33 L. R. A., N. S., (Wash.), 633, an inheritance tax statute of Washington provided that on all sums passing to or for the benefit of collateral relatives or strangers of the blood, who are alien non-residents of the United States, a tax of 25% should be levied and collected. A citizen of Washington had died leaving real and personal property and his heirs and next of kin were all citizens of Norway. They contended they should only be taxed 3%, the inheritance tax imposed on citizens of the United States.

A treaty with Norway and Sweden contained a provision to the effect that the heirs of a subject of either party to the treaty, who were subjects of the other party should, receive the succession without having occasion to take out letters of naturalization and the succession should

be free from all "'droit de detraction." The treaty also contained a provision that "the United States on their part or any of them, shall be at liberty, to make, respecting this matter such laws as they think proper."

The court held that the treaty controlled, that a tax of 3% only could be imposed and that the statute discriminates against aliens and impairs their right or privilege of receiving property by testament or inheritancec.

The court says (at p. 634):

> "It has become the settled law of this country that, when a law of a state comes in conflict with the provisions of a treaty entered into by the United States with a foreign country, relating to a subject matter within the treaty making power, such law must give way, and its application to the subject-matter covered by the treaty held in abeyance during the existence of the treaty."

And at p. 638:

> "We think this treaty was intended to secure and does secure to the citizens of Sweden and Norway, the right to succeed to property left them by will or inheritance upon the same terms as such rights of our own citizens may be defined by law. These are the rights and the law defining them, which must have been in view in the making of the treaty, rather than possible discriminating laws affecting the rights of aliens different from citizens; for, to concede the right to make and enforce such laws is to concede the right to nullify the provisions of the treaty."

In the case of *People v. Gerke* (5 Cal., 381) the Supreme Court of California elaborately discusses the validity of treaties and their binding force under the Constitution of the United States,

and upholds the article of the treaty of 1828 with Prussia, providing as follows:

> "Where on the death of any person holding real estate within the territories of the one, such real estate would by the laws of the land descend to a citizen or subject of the other were he not disqualified by alienage, such citizen or subject shall be allowed a reasonable time to sell the same and to withdraw the proceeds without molestation."

The court recognizes and follows the reasoning of many of the other cases above cited, and refers to the works of Jefferson, Calhoun and others of the early statesmen as supporting the views stated.

In the case of *Blythe v. Hinckley* (127 Cal., 431) the question before the court involved the consideration of whether or not there was a conflict between the provisions of a treaty with Great Britain with regard to the right of its subjects to inherit lands in any state of the United States, and the laws of California. The court finds that there was no such conflict, and takes occasion to remark:

> "It has been affirmed and re-affirmed in the decisions of the Supreme Court of the United States that the question of the possession, enjoyment and inheritance of property by a resident or non-resident is the proper subject matter of a treaty."

In *Wilkie v. Wilkie* (102 Iowa, 174), the question was as to the right of subjects of the King of Prussia to inherit lands in the State of Iowa, there being a conflict between the provisions of the Treaty with Prussia and the statutes of Iowa. The court held the treaty provisions controlling and said (page 181):

> "Nor is there any question but that if the plaintiff and the other appellees were subjects of the King of Prussia, * * * the treaty operates to relieve them from the prohibitions of the law."

The difficulties, embarrassments and inconsistencies in which we have from time to time found ourselves involved as a nation, by reason of the fact that Congress failed to enact laws adequate to the enforcement of the stipulations of treaties, in cases where such stipulations were not self-executing, and where questions arose under such conditions that our federal courts had no jurisdiction, furnish added and impressive reasons why courts should fearlessly and fully enforce such provisions, in cases where they properly come before them.

The following occurrences involved us in considerable difficulty with various nations: the mobbing of Chinamen at Denver in 1880, and, again at Rock Springs, Wyoming, in 1885; the lynching of Italian subjects at New Orleans, in 1891, at Rouse, Colorado, in 1895, at Tallulah, Louisiana, in 1899, and at Erwin, Mississippi, in 1901; and the lynching of certain Mexicans in California, in 1895.

In several of these cases, foreign governments asserted the rights of their citizens to protection under existing treaty provisions. Our Secretary of State could, and did, only take the position that punishment for those offenses was entirely within the control of the state governments, there being an absence of federal laws providing for their punishment.

In the case of the Mafia riots, in 1889, Secretary Blaine said:

> "If it shall result that the case can be prosecuted only in the state courts of Louisi-

> ana, and the usual investigation and procedure under the criminal law is not resorted to, it will then be the duty of the United States to consider whether some other form of redress may be asked."

The Secretary reached the conclusion that the power of punishment was exclusively within the jurisdiction of Louisiana, and added:

> "But only because the Congress had neglected to pass legislation making such violations of our treaties criminal offenses remediable in the federal courts."

In response to this view Marquis Rudini, in a note to the Italian Minister at Washington, said:

> "Let the federal government reflect on its side if it is expedient to leave to the mercy of each state of the Union, irresponsible to foreign countries, the efficiency of treaties pledging its faith and honor to entire nations."

As Secretary Root pointed out later, this situation left us practically defenseless against claims for indemnity by foreign nations, because of "our failure to extend over these aliens the same protection that we extended to our own citizens, and the final result of the correspondence in each case has been the *payment of indemnity*, for the real reason that we have not performed our international duty."

Of course, the very fact that Congress appropriated the money to make such compensation, amounted to an explicit admission of the extent and validity of our treaty obligations.

It will be recalled as a matter of recent history that Presidents Harrison, McKinley, Roosevelt and Taft each sought to induce Congress to enact laws conferring upon the federal courts

jurisdiction to punish violations of federal treaties by the citizens of a state. Congress, however, has failed to do so, notwithstanding it appropriates money to make compensation for injuries resulting from such violations.

The inconsistency between our position in the instances cited, or at least the international embarrassment that arises from the lack of power on the part of the National Government to enforce the observance of a treaty, is well illustrated by the fact that when, in 1875, an American citizen was injured in a province in Brazil, and the Brazilian Government took the position that it could not control the province or prevent the injury, Secretary Fish wrote:

> "You represent that the facts as set forth in the memorial of the claimant are admitted by that government, which, however, denies its accountability and says that the province where the injury to Mr. Smythe took place is alone answerable. Supposing, however, the case to be a proper one for the interposition of this government, the reference of the claimant to the authorities of the province for redress will not be acquiesced in. Those authorities cannot be officially known to this government. It is the imperial government at Rio de Janeiro only which is accountable to this government for any injury to the person or property of a citizen of the United States committed by the authorities of a province. It is with that government alone that we hold diplomatic intercourse. The same rule would be applicable to the case of a Brazilian subject who, in this country, might be wronged by the authorities of a state."

As is said in the *Gerke* case (*supra*):

> "The only questions, then, which can arise in the consideration of the validity of a treaty are:

"First, Is it a proper subject of treaty according to international law or the usage and practice of civilized nations?

"Second, Is it prohibited by any of the limitations in the Constitution?"

This rule as to validity finds ample warrant and indeed is stated, but in somewhat different language, in the decisions of this court above referred to. It is also pointed out over and over again in those cases that the right of employment and the right to pursue ordinary busness and enjoy the protection of the laws accorded to citizens, are clearly proper subjects of treaties and within the treaty-making power, whatever the rule may be as to the rights of aliens to acquire title to real estate, in view of our past policy of permitting the states in which the real estate is located to regulate such rights.

This review of the authorities, in our judgment, leaves no room to doubt that the provisions of Section 14 of the Labor Law prohibiting the employment of aliens is void under the provisions of the treaties mentioned, no less than under the provisions of the Fourteenth Amendment of the Constitution.

The enactment of such legislation is nothing more or less than an attempt on the part of a state to exercise powers it expressly granted to the National Government on the adoption and ratification of the constitution. As we have seen, the ratification by the several States was after full discussion and a clear understanding of the nature and far-reaching effect of the treaty-making power and of the limitations it placed upon State authority to interfere with its exercise or to limit in any degree the effect and operation of treaty

stipulations regarding matters within the treaty-making power, as defined in the constitution and recognized and practiced by civilized nations.

We deem it proper to call attention in this connection to recent manifestations on the part of certain states of a determination to exercise the right of enacting legislation in conflict with treaty stipulations. It is, in our judgment, a matter of disturbing, if not of dangerous, significance. It is much to be feared that it will lead to international complications of grave import. Even now, evidence is not lacking to confirm this view. The wisdom of prompt and effective action to avoid and guard against such consequences, would seem to be apparent. Congress can render no greater service than to enact legislation adequate to that end, if any further legislation is needed.

No department of our government is clothed with greater power to avert the threatened evils, than is our judiciary. It has not hesitated in the past to firmly and fearlessly uphold treaty stipulations by its condemnation of provisions of state statutes and state constitutions in conflict with them.

We may readily admit the conclusion of a profound thinker and noted writer on sociological subjects when he asserts that social needs are almost invariably in advance of the laws. It is the province of statesmanship to keep the margin dividing them as narrow as possible. Its success in doing so may also be accepted as a test of progress. It does not follow, however, that state legislatures, acting upon their judgment of the requirements of social needs, may enact laws to secure them which are in conflict with the policy embodied in the constitution in the powers therein granted to the federal government for its ex-

clusive exercise. Otherwise, national policy and national power would find themselves in constant warfare with an ever increasing number of State statutes.

The compact embodied in a treaty has but three sanctions to insure its observance, viz.: promotion of self-interest, fear of losing prestige through dishonorable action and reclamations by superior force. From the foundation of our government to the present time, national honor and national good faith have been the sole and all-sufficient considerations for the scrupulous observance by our National Government of its treaty stipulations.

These views involve no injustice to the people of any state. Our government is based on the theory of control by the majority, which applies in the case of states as well as of individuals. If the time has arrived when the requisite majority of the states of this country and the people thereof, desire to repossess themselves of the treaty-making power, or to limit its exercise by the National government, they have the right and power to do it by amendment to the constitution in the manner prescribed in that instrument. In no other way can it be done.

When, therefore, in our existing treaties we find provisions guaranteeing to citizens of other nations rights guaranteed by the constitution to our own citizens, every consideration of good faith and national honor demands that they be enforced and protected in full measure. The argument that those guarantees do not apply except to citizens born in this country and to aliens only after they have acquired citizenship, is palpably fallacious.

If the position were sound, that the treaty stipulations do not protect aliens, intermediate their

arrival here and the time required to become naturalized, then they are without protection under treaty provisions.

The upholders of legislation of the kind in question also claim and, of course, must successfully maintain, in order to justify the legislation, that aliens are without protection under the provisions of the constitution also.

The moment, therefore, they place foot on the shores of this land of freedom, they find that the most fundamental right of free men may be either taken from them altogether, vitally impaired, or at best placed at the mercy of any state legislature which, for any reason satisfactory to it, or for none, may destroy all opportunity for the exercise of that right, although the majority of aliens must depend upon it for their very existence.

If that be true, what was meant by the following language in the Declaration of Independence?

> "We hold these truths to be self-evident, "that all men are created equal; that they are "endowed by their Creator with certain in-"alienable rights; that among these, are life, "liberty and the pursuit of happiness."

This court in the *Ellis* case, *supra,* declared that instrument to be

> "the first official action of the nation," "the foundation of government," and the "spirit" and "body" of our governmental policy.

In that case this court further declared:

> "No duty rests more imperatively upon the courts than the enforcement of these Constitutional provisions intended to secure that equality of rights which is the foundation of every government."

No foreign government can be assumed to have

entered into a treaty in order to secure rights to its citizens resident here, after they have acquired American citizenship. Such guarantee would then be not only unnecessary, but inoperative, as such individuals would then have no right to invoke the protection of their native country and it would have no right to extend its protection.

On the other hand, to assume that foreign nations entered into treaties with us to protect citizens of their own country, resident here, only on condition that they are to become American citizens at the earliest moment, is to suppose that such nations intended to supply strong inducements for their citizens abandoning allegiance to their native lands. This conclusion certainly is not justified by the policy and experience of the past.

It must, therefore, be evident that, if at this period of our history and progress we are to enact and uphold laws discriminating against alien residents, both the Declaration of Independece and the Constitution must be rewritten, to make them harmonize with a doctrine so utterly at variance with the ideals of the framers of both instruments; for deprivation of the right of any one to labor for whom he will and upon such terms as he may agree, under whatever guise it appears, is, in essence, slavery.

It is not asserted, or to be implied, that we deem those who seek to uphold such legislation, whether native born or naturalized citizens, to be less sensitive of the honor of their country or less solicitous that it adhere to and carry out every compact it has entered into with other nations, with the most scrupulous good faith, than their fellow-citizens. If such assertion were made, our history would refute it. Neither do we ques-

tion their sincerity and good faith in seeking to enforce the law in question. If valid, it should be enforced and obeyed, whether we agree with its policy or not, for with that courts have no concern. We are simply endeavoring to show that the legislation violates our fundamental law and contravenes existing treaty stipulations. If so, the judgment of a competent court so declaring, is of vital concern to the paintiffs-in-error, the city and the general public, as well as to aliens resident therein.

III.

This Court is not concluded by any construction put upon section 14 of the labor law by the Court of Appeals in the decision of this case.

It may be urged by the defendants-in-error, that this court is bound by the determination of the Court of Appeals in this case, because that determination rests upon the construction of a state statute.

While it is true that the decision of the Court of Appeals rests entirely upon the construction of the words "public works" as they appear in section 14 of the Labor Law, and it must, to support its judgment, have determined that the construction of Rapid Transit Subways by the City of New York, is a public work, a work being performed by the city in the exercise of a governmental function; that the state, in the statute complained of, has merely prescribed a course of conduct for itself, which is to be carried out through the agency of the municipality as one of the state's

civil divisions; and that the city, therefore, has no standing to object to that legislation, such a construction of the statute cannot prevent this court from instituting an independent inquiry and investigation into federal questions properly raised by the record.

To sustain the contention of the defendants-in-error, is to declare that a state court may, by mere construction of the very statute complained of, oust this court of jurisdiction to determine whether or not that statute, as so construed, contravenes the constitution, laws or treaties of the United States, a proposition palpably fallacious.

To sustain this contention is to declare that a writ of error issued out of this court to review the decision of a state court, sustaining the validity of the statute asserted to be contrary to the laws, constitution or treaties of the United States, is an empty and an idle form.

Jefferson Branch of the State Bank of Ohio v. Skelley, 1 Black, 436, 443.

In that case, the bank had brought suit against the county treasurer for the recovery of money which had been seized by him in the collection of taxes assessed against the bank.

By the act incorporating the bank it was provided that the bank should not be liable for any "other or greater taxes than 6 per cent. on its profits," but the county treasurer's levy was made pursuant to a later statute, and was in an amount exceeding 6 per cent. on the profits of the bank.

This court held that the later statute was unconstitutional because it impaired the contract raised by the act of the legislature incorporating the bank.

It was urged on behalf of the defendant-in-error that the construction put upon the act of in-

corporation by the Ohio court was conclusive upon this court. This court says at page 443:

> "It has never been denied, nor is it now, that the Supreme Court of the United States has an appellate power to revise the judgment of the Supreme Court of a state, whenever such a court shall adjudge that not to be a contract, which has been alleged, in the forms of legal proceedings by a litigant, to be one, within the meaning of that clause of the Constitution of the United States which inhibits the states from passing any law impairing the obligation of contracts. *Of what use would the appellate power be to the litigant who feels himself aggrieved by some particular state legislation, if this court could not decide, independently of all adjudication by the Supreme Court of a state, whether or not the phraseology of the instrument in controversy was expressive of a contract and within the protection of the constitution of the United States, and that its obligation should be enforced, notwithstanding a contrary conclusion by the Supreme Court of a state?* It never was intended, and cannot be sustained by any course of reasoning, that this court should, or could, with fidelity to the Constitution of the United States, follow the construction of the Supreme Court of a state in such a matter, when it entertained a different opinion; and in forming its judgment in such a case, it makes no difference in the obligation of this court in reversing the judgment of the Supreme Court of a state upon such a contract, whether it be one claimed to be such under the form of State legislation, or has been made by a covenant or agreement by the agents of a state, by its authority."

In *Wright v. Nagle*, 101 U. S., 791, error to Supreme Court of the State of Georgia, this court held that where the highest court of a state had "been called upon to interpret the contracts of a

state, though they have been made in the forms of law or by the instrumentality of a state's authorized functionaries in conformity with state legislation," this court would review the decision of the state court on the construction of such legislation.

In *Illinois Central R. R. Co. v. Chicago*, 176 U. S., 646, the validity of an ordinance of the City of Chicago, practically prohibiting the construction of piers in its harbor without the permission of the Commissioner of Public Works, was challenged by the railroad company on the ground that it impaired the contract contained in the franchise previously granted to the company "to take possession of and use all and singular any lands, streams and materials of every kind for the location of depots and stopping stages for the * * * complete operation of said road" and the grant of said "lands, streams and materials." The Supreme Court of Michigan had held that the franchise and grant did not include the waters of Lake Michigan.

This court says (page 656):

> "The question then is reduced to this: giving to the charter of the railroad company the broadest construction claimed by it—and in determining the existence of a federal question, we are bound to do this—may it not be reasonably insisted that, under the * * * ordinance * * * the right of the railroad company to enter upon and take possession of and use all * * * streams is impaired? We think it may. Without determining the effect of such ordinance, the question whether it impairs the charter of the company, giving to that charter a broad construction, is fairly open to contention. (*Bacon v. Texas*, 163 U. S., 207, 216; *Walla Walla v. Walla Walla Water Co.*, 172 U. S., 1, 5, 10.)"

And at page 657:

> "Upon the merits, the case turns upon the proper construction of the charter of the Illinois Central Railroad Company, granted by the General Assembly, February 10, 1851. As was said in the case of *Walsh v. Columbus, Hocking Valley & Athens Railroad Company, ante,* 469, and the prior cases therein cited, whenever a contract created by a state statute is alleged to have been impaired by subsequent legislation, *it is for this court to determine the proper construction of such statute, as well as the question whether the subsequent legislation has impaired it.*"

Even in cases originating in the federal courts, in regard to which the judiciary act provides that "the laws of the several states except where the constitution, treaties or statutes of the United States shall otherwise recognize or provide, shall be regarded as rules of decision in trials at common law in courts of the United States, in cases where they apply,' this court has not felt constrained to follow the interpretation put upon state statutes by the state courts, except in matters affecting purely local considerations, such as the question of title to property, or the question whether or not a particular use of property, in view of the geographical situation or economic conditions of a state, is a public use.

Swift v. Tyson, 16 Peters, 1, 19;
Russell v. Southard, 12 Howard, 139, 147;
Watson v. Tarpley, 18 Howard, 517, 520;
Chicago City v. Robbins, 2 Black 418;
Butz v. City of Muscatine, 8 Wallace, 575;
Olcott v. Supervisors, 16 Wallace 678;

Boyce v. Tabb, 18 Wallace, 546;
Oates v. National Bank, 100 U. S., 239, 246;
Railroad Company v. National Bank, 102 U. S., 14;
Burgess v. Seligmann, 107 U. S., 20;
Pana v. Bowler, 107 U. S., 529;
Fallbrook Irrigation District v. Bradley, 164 U. S., 112, 160;
Clark v. Nash, 198 U. S., 361, 369;
Houston v. Danville & Western Ry. Co., 208 U. S., 598, 607;
Union Lime Company v. Chicago & Northwestern Railroad Co., 233 U. S., 211.

In *Butz v. City of Muscatine,* 8 Wall., 575, the plaintiff-in-error had obtained a judgment against the defendant-in-error on certain city bonds issued in the year 1854. Execution was issued upon his judgment and returned unsatisfied. He sought by mandamus to compel the city to levy under the provisions of the Code of the State of Iowa, adopted in 1851, a tax sufficient to pay the judgment. The city in its return to his petition for a writ of mandamus alleged that in the year 1852 its charter had been so amended by act of the legislature that it was prevented from levying a tax exceeding one per cent. upon the assessed valuation of taxable property; that, during the current year it had levied a tax of one per cent. upon the value of such taxable property, and the entire amount collected had been expended for the necessary current and incidental expenses of the city; that the entire amount to be levied, in accordance with this amendment of its charter, for the following year would be needed for the same purposes; and that these expenses were a

paramount lien upon the fund. The plaintiff-in-error demurred to the return and, the Circuit Court having overruled his demurrer, appealed to this court. The case as stated by this court involved two questions (page 577):

> "1. *Whether the construction given by the Supreme Court of Iowa to the provisions of the codes and to the charter of the city was one which in the judgment of this court could, in itself be sustained?*
>
> "2. If not, then—since the effect of the decisions in question was to deprive creditors of the only practicable means of enforcing against certain corporations which had made them, contracts solemnly entered into by those corporations prior to the date of the decisions—whether this was a case where the Supreme Court would adhere to its rule, confessedly obligatory in most cases, that it would follow, irrespective of what it might itself think of the correctness of such decisions, the decisions given by the state courts in the construction of their own state statutes; the question here more particularly arising on a writ of error in ordinary course to a Circuit Court of the United States, and not on a writ to the Supreme Court of the state, in which case this court has power by the Judiciary Act to re-examine and reverse any decision of such a court, where there has been drawn in question the validity of a statute of or an authority exercised under the State, on the ground of their being repugnant to the laws of the United States, and the decision has been in favor of their validity."

This court held that the amendment to the charter of the City of Muscatine had no reference to the levying of taxes for the purpose of raising funds to pay judgments recovered against the city, and in the course of its opinion says, (page 582):

"There are several adjudications of the highest court of the State more or less adverse to the views we have expressed. We do not deem it necessary more particularly to advert to them. Entertaining the highest respect for those by whom they were made, we have yet been unable to concur in the conclusions which they announce. It is alike the duty of that court and of this to decide the questions involved in this class of cases, as in all others, when presented for decision. This duty carried with it investigation, reflection, and the exercise of judgment. It cannot be performed on our part, by blindly following in the footsteps of others and substituting their judgment for our own.

Were we to accept such a solution we should abdicate the performance of a solemn duty, betray a sacred trust committed to our charge, and defeat the wise and provident policy of the Constitution which called this court into existence."

While the defendants-in-error submitted no brief, it had been suggested, apparently by some of the members of this court, that the interpretation of the provisions of the Iowa Code which had been given to them by the Supreme Court of the State should control the judgment of this court. This assertion found no favor. This court says (page 582):

"In all the cases brought here under the 25th section of the Judiciary Act, this Court has never hesitated to determine for itself the construction and effect of any statute of a state brought under review, without reference to the previous adjudications of the highest court of the state upon the subject. In the opinion delivered in the case of the *Jefferson Branch of the State Bank of Ohio v. Skelly* (1 Black, 436), it was well asked: *Of what value would the appellate power of*

this court be to the party aggrieved if such were not the rule?"

And at page 584:

> "This court construes all contracts brought before it for consideration, and in doing so its action is independent of that of the state courts, which may have exercised their judgment upon the same subject (*Swift v. Tyson*, 16 Peters, 19). This is one of the functions we are called upon to perform in this case. The fact that one of the elements in the case is a statute of the state does not affect the legal result."

In *Olcott v. The Supervisors*, 16 Wallace, 678, the plaintiff in error had sued the supervisors of the County of Fond du Lac, Wisconsin, upon certain county orders issued in pursuance of an act of the assembly of the state, authorizing the county to aid the completion of a railroad. The act provided for a vote by the people of the county upon the question, and they voted in favor of granting the aid.

The Supreme Court of the State of Wisconsin had held in previous litigation that the act was void,

> "upon the ground that the building of a railroad, to be owned and worked by a corporation in the usual way, was not an object in which the public were interested, and therefore that the act in question was void, for the reason that it authorized the levy of a tax for a *private* and not a *public* purpose."

The Circuit Court for the Eastern District of Wisconsin, to which the writ of error in the present case was directed, had held that it was bound by the decision of the state court as to the validity of the act of the state assembly and of

the county orders issued pursuant thereto. This court, however, held that it was not bound by the previous decisions of the state court, inasmuch as they were not founded upon a consideration of local questions, and, applying the principles of general jurisprudence, reversed the decree of the Circuit Court and held, that the act, and the orders issued pursuant thereto, were valid and effective. It says (at page 689):

> "It is undoubtedly true in general, that this court does follow the decisions of the highest courts of the states respecting local questions peculiar to themselves, or respecting the construction of their own constitutions and laws. But it must be kept in mind that it is only decisions upon local questions, those which are peculiar to the several states, or adjudications upon the meaning of the constitution or statutes of a state, which the federal courts adopt as rules for their own judgments. That *Whiting v. Fond du Lac County* (the Wisconsin case establishing the construction contended for by defendant-in-error), was not a determination of any question of local law, is manifest. It is not claimed to have been that. But it is relied upon as having given a construction to the constitution of the state. Very plainly, however, such was not its character or effect. The question considered by the court was not one of interpretation or construction. The meaning of no provision of the state constitution was considered or declared. What was considered was the uses for which taxation generally, taxation by any government, might be authorized, and particularly whether the construction and maintenance of a railroad, owned by a corporation, is a matter of public concern. It was asserted (what nobody doubts), that the taxing power of a state extends no farther than to raise money for a public use, as

distinguished from private, or to accomplish some end public in its nature, and it was decided that building a railroad, if it be constructed and owned by a corporation, though built by authority of the state, is not a matter in which the public has any interest, of such a nature as to warrant taxation in its aid. For this reason it was held that the state had no power to authorize the imposition of taxes to aid in the construction of such a railroad, and therefore that the statute giving Fond du Lac County power to extend such aid was invalid. This was a determination of no local question, or question of statutory or constitutional construction. It was not decided that the legislature had not general legislative power; or that it might not impose or authorize the imposition of taxes for any public use. *Now, whether a use is public or private is not a question of constitutional construction.* It is a question of general law. It has as much reference to the constitution of any other state as it has to the state of Wisconsin. Its solution must be sought not in the decisions of any single state tribunal, but in general principles common to all courts. The nature of taxation, what uses are public and what are private, and the extent of unrestricted legislative power, are matters which, *like questions of commercial law,* no state court can conclusively determine for us. This consideration alone satisfies our minds that *Whiting v. Fond du Lac County* furnishes no rule which should control our judgment, though the case is undoubtedly entitled to great respect." (Italics ours.)

The rule seems to be that where strictly local considerations enter into a determination of the true construction to be given to a statute, the decisions of the state courts will be given great weight, but they are not even in these instances absolutely controlling.

In *Oates v. National Bank*, 100 U. S., 239, this court says (page 246):

> "While the federal courts must regard the laws of the several states, and their construction by the state courts (except when the Constitution, treaties, or statutes of the United States otherwise provide) as rules of decision in trials at common law in the courts of the United States, in cases where applicable, they are not bound by the decisions of those courts upon questions of general commercial law. Such is the established doctrine of this court, so frequently annouced that we need only refer to a few of the leading cases bearing upon the subject. *Swift v. Tyson*, 16 Pet., 1; *Carpenter v. Prov. Ins. Co.*, id., 495; *Watson v. Tarpley*, 18 How., 517. We have already seen that the statutes of Alabama placed under the protection of the commercial law promissory notes, payable in money at a certain designated place; but how far the rights of parties here are affected by the rules and doctrines of that law is for the federal courts to determine upon their own judgment as to what these rules and doctrines are."

In *Boyce v. Tabb*, 18 Wallace, 548, it was urged that the decisions of the courts of Louisiana, holding that promissory notes delivered as the price of slaves were invalid, because against public policy, should be followed by the federal courts in Louisiana under the 34th section of the Judiciary Act, providing:

> "The laws of the several states * * * shall be regarded as rules of decision of the trials at common law in the courts of the United States, in cases where they apply."

That court says at page 548:

> "It is urged on the part of the plaintiff in error, as the highest court in Louisiana has,

on grounds of public policy, refused to enforce contracts like this, since the abolition of slavery, that the thirty-fourth section of the Judiciary Act of 1789 obliges this court to follow that rule of decision.

This is an erroneous view of the obligation imposed by that section on this court, as our decisions abundantly show (*Swift v. Tyson*, 16 Peters, 1). The provisions of that section do not apply, nor was it intended they should apply, to questions of a general nature not based on a local statute or usage, nor on any rule of law affecting titles to land, nor on any principle which had become a settled rule of property. The decisions of the state courts, on all questions not thus affected, are not conclusive authority, although they are entitled to, and will receive from us, attention and respect."

The proposition is well stated by Mr. Justice PECKHAM in *Fallbrook Irrigation District v. Bradley*, 164 U. S., 112.

In discussing the decisions of the courts of California, to the effect that the taking of private property by an individual for purposes of irrigation of lands owned by him and intended to be cultivated is a taking for a public use, the learned Justice said (page 160):

"The people of California and the members of their legislature must, in the nature of things, be more familiar with the facts and circumstances which surround the subject, and with the necessities and the occasion for the irrigation of the lands, than can anyone be who is a stranger to her soil. This knowledge and familiarity must have their due weight with the state courts which are to pass upon the question of public use in the light of facts which surround the subject in their own state. For these reasons, *while not regarding the matter as concluded* by

> these various declarations and acts and decisions of the people and legislature and courts of California, we yet, in the consideration of the subject, accord to and treat them with very great respect." (Italics ours.)

In the case at bar, there is no local question whatever upon which the local courts could be deemed to be so well informed that this court should have any hesitation in interfering with the decision reached. The question here is one within the realm of general jurisprudence, and is a question involving property rights of the City of New York, of the various subway construction contractors, and the liberty and property of resident aliens and citizens of sister states.

So also in *Pana v. Bowler,* 107 U. S., 529, this court refused to follow the decisions of the courts of the State of Illinois, to the effect that, where town bonds had been issued and there were certain irregularities in the proceedings prior to the issue of the bonds, the bonds themselves, although reciting on their face that all the proceedings prior to their issue were in all respects regular and in compliance with the statute authorizing the issue, were unenforceable by a *bona fide* holder.

Mr. Justice Woods says (at page 540):

> "It is insisted that this court is bound to follow this decision of the Supreme Court of Illinois and hold the bonds in question void. We do not so understand our duty. Where the construction of a State constitution or law has become settled by the decision of the state courts, the courts of the United States will, as a general rule, accept it as evidence of what the local law is. Thus, we may be required to yield against our own judgment to the proposition that, under the charter of the railway company, the election in this case,

which was held under the supervision of a moderator chosen by the electors present, was irregular and therefore void. But we are not bound to accept the inference drawn by the Supreme Court of Illinois, that in consequence of such irregularity in the election, the bonds issued in pursuance of it by the officers of the township, which recite on their face that the election was held in accordance with the statute, are void in the hands of *bona fide* holders. *This latter proposition is one which falls among the general principles and doctrines of commercial jurisprudence, upon which it is our duty to form an independent judgment, and in respect of which we are under no obligation to follow implicitly the conclusions of any other court, however learned or able it may be.* (*Swift v. Tyson,* 16 Pet., 1; *Russell v. Southard,* 12 How., 139; *Watson v. Tarpley,* 18 id., 517; *Butz v. City of Muscatine,* 8 Wall., 575; *Boyce v. Tabb,* 18 id., 546; *Oates v. National Bank,* 100 U. S., 239; *Railroad Company v. National Bank,* 102 id., 14.) See also *Burgess v. Seligman,* 107 id., 20, where the question, how far the courts of the United States are bound by the decision of the state courts, is carefully re-examined, and the rule on the subject stated with precision.

"We cannot follow the decision of the Supreme Court of Illinois in *Lippincott v. Town of Pana, ubi supra,* without overruling a uniform current of the decisions of this court, beginning with *Commissioners of Knox County v. Aspinwall,* 21 How., 539, and continuing down to the present time. The rights of the *bona fide* holder of negotiable municipal bonds, as we have stated them in this opinion, are too firmly settled by the decisions of this court to be shaken.

"Our conclusion is, therefore, that the bonds in question in this case are valid in the hands of a *bona fide* holder, notwithstanding the irregularity in the conduct of the election

by which they were claimed to be authorized."

Even in cases in which strictly local questions are involved and in which, therefore, this Court would ordinarily feel controlled by the decision of the State Court on such questions, this Court will not follow a decision "which is clearly without ground."

> *Union Lime Company v. Chicago and Northwestern Railway Company,* 233 U. S., 211.

In that case the Supreme Court of Wisconsin had affirmed a judgment in a condemnation proceeding instituted by the defendant-in-error, for the purpose of acquiring land for the extension of its road by the laying of spur tracks over the land of the plaintiff-in-error.

The plaintiff-in-error contended that the purpose of the defendant-in-error in seeking to obtain the right to lay the new spur tracks was to accommodate a single industry and was, therefore, a private purpose.

The decision of the state court that the acquisition of the land for the laying of the proposed spurs was for a public use was followed by this court.

Mr. Justice Hughes, writing the opinion of the court, says (page 218):

> **"The assignments of error come to the single point—as to the character of the use. The state through its highest court declares the use to be a public one, and we should accept its judgment *unless it is clearly without ground.* (*Fallbrook Irrigation District v. Bradley,* 164 U. S., 112, 160; *Clark v. Nash,* 198 U. S., 361, 369; *Strickley v. Highland***

Bay Mining Co., 200 U. S., 527, 531; *Offield v. N. Y. N. H. & H. R. R. Co.*, 203 U. S., 372, 377; *Haviston v. Danville & Western Ry. Co.*, 208 U. S., 598, 607.) (Italics ours.)

IV.

Every question which was before the Court of Appeals is before this court, except the question as to the conflict of section 14 of the labor law with the provisions of the constitution of the State of New York.

We have shown at pages 169 to 185 of this brief, that this court cannot be deprived of its appellate jurisdiction by the decision of a state court, based upon the application of principles of fundamental law and natural justice, and not upon questions of merely local significance, and that even in the case of questions of local significance, this court will review the decision of a state court, if the case contains a federal question properly raised, when the decision of the state court is "clearly without ground."

Indeed, the raising of the federal question opens the record to this court for adjudication by it of every question associated with the federal question, and necessarily to be considered in determining whether or not, if the federal question has been wrongly decided, the plaintiffs-in-error are entitled to the relief sought.

Martin v. Hunter, 1 Wheaton, 304;
Tennessee v. Davis, 100 U. S., 257.

In the *Martin* case, the defendant in ejectment had sought to justify his possession under the treaty of peace with Great Britian of 1783; but the Court of Appeals of Virginia had refused to recognize any title in him.

MR. JUSTICE STORY says with regard to the appellate jurisdiction of this court (page 357):

> "It is, * * * the decision against the title set up, with reference to the treaty, and not the mere abstract construction of the treaty itself, upon which the statute intends to found the appellate jurisdiction. How, indeed, can it be possible to decide, whether a title be within the protection of a treaty, until it is ascertained what that title is, and whether it have a legal validity From the very necessity of the case, there must be a preliminary inquiry into the existence and structure of the case, there must be a preliminary inquiry into the existence and structure of the title, before the court can construe the treaty in reference to that title. If the court below should decide, that the title was bad, and, therefore, not protected by the treaty, must not this court have a power to decide the title to be good, and, therefore, protected by the treaty? Is not, the treaty, in both instances, equally construed, and the title of the party, in reference to the treaty equally ascertained and decided? Nor does the clause relied on in the objection, impugn this construction. It requires, that the error upon which the appellate court is to decide, shall appear on the face of the record, and immediately respect the questions before mentioned in the section. One of the questions is, as to the construction of a treaty upon a title specially set up by a party and every error that immediately respects that question must, of course, be within the cognizance of the court. The title set up in this case is apparent upon the face of the

record, and immediately respects the decision of that question; any error, therefore, in respect to that title must be re-examinable, or the case could never be presented to the court.

"The restraining clause was manifestly intended for a very different purpose. It was foreseen, that the parties might claim under various titles, and might assert various defences, altogether independent of each other. The court might admit or reject evidence applicable to one particular title, and not to all, and in such cases, it was the intention of congress, to limit what would otherwise have unquestionably attached to the court the right of revising all the points involved in the cause. It, therefore, restrains this right to such errors as respect the questions specified in the section; and in this view, it has an appropriate sense, consistent with the preceding classes. We are, therefore, satisfied, that, upon principle, the case was rightfully before us, and if the point were perfectly new, we should not hesitate to assert the jurisdiction.

"But the point has been already decided by this court upon solemn argument. In *Smith v. State of Maryland* (6 Cranch., 286), precisely the same objection was taken by counsel and overruled by the unanimous opinion of the court. That case was, in some respects, stronger than the present; for the court below decided, expressly, that the party had no title, and therefore, the treaty could not operate upon it. This court entered into an examination of that question, and being of the same opinion, affirmed the judgment. There cannot, then, be an authority which could more completely govern the present question."

In *Tennessee v. Davis*, 100 U. S., 257, a prosecution for murder had been removed into the federal court from the state court under the author-

ity of Section 643 of the revised statutes, authorizing such removal, where the prosecution was against one acting by authority of any revenue law of the United States, the defendant-in-error asserting that the killing for which he was prosecuted in the state court, was done by him in the exercise of his duty, under the revenue laws, to seize illicit distilleries and the apparatus used for the illicit and unlawful distillation of spirits.

STRONG, J., delivering the opinion of the court, approves the decision in *Mayor v. Cooper*, 6 Wallace, 247, establishing the validity of the removal acts, as follows:

> "This court then said: The constitutional power is given in general terms. No limitation is imposed. The broadest language is used. 'All cases' so arising are embraced. How jurisdiction shall be acquired by the inferior court (of the United States), whether it shall be original or appellate, or original in part and appellate in part, and the manner of procedure in its exercise after it has been acquired, is not prescribed. This Constitution is silent upon these subjects. They are remitted without check or limitation to the wisdom of the legislature. Jurisdiction, original or appellate, alike comprehensive in either case, may be given. The constitutional boundary line of both is the same. Every variety and form of appellate jurisdiction within the sphere of the power, extending as well to the courts of the states as to those of the nation, is permitted. There is no distinction in this respect between civil and criminal cases. Both are within its scope. *Nor is it any objection that questions are involved which are not at all of a federal character. If one of the latter exist, if there be a single such ingredient in the mass, it is sufficient.*" (Italics ours.)

V.

Even if Section 14 of the Labor Law be held constitutional, it does not apply to labor employed in the performance of the subway contracts in question for the following reasons:

(a) They are not the character of "public" contracts mentioned in Section 14;

(b) Even if they were, the section must be deemed to be repealed or superseded by the Rapid Transit Act and its amendments;

(c) If the Labor Law ever did apply, the City is estopped from invoking it, or its right to do so had been waived.

As each of the above propositions is supported in part by common considerations and, in case any of them is sustained, the same result must follow, namely, the inapplicability of said section of the Labor Law to the subway contracts, it will be more convenient and effective to discuss them under the same point and, more or less, in connection.

As we have shown, under Point I (pages 21 to 116, *supra*), there is a clear and well recognized distinction between the rights of the city as a governmental agent and the rights of the city as a proprietor; between its *public* functions and its *private* functions. This distinction has been the subject of frequent and elaborate judicial discussion. From the time of the de-

cision in *Lloyd v. Mayor* (5 N. Y., 369), until now, the Court of Appeals has kept the distinction clearly in view, but it is nowhere better outlined than in *Matter of Board of Rapid Transit Commissioners* (197 N. Y., 81).

In that case, the court had before it for consideration the identical law, the so called Rapid Transit Act, under which the subway construction contracts in question were entered into. The court said at p. 96:

> "The subway is a business enterprise of the city, through which money may be made or lost, the same as if it were owned by an ordinary railroad corporation." * * *
>
> "The city owns the subway, and it is a railroad corporation, so far as the construction, operation and leasing thereof is concerned."

In short, the Court of Appeals has held, that the building of the subways in The City of New York is a strictly private venture of the city, in which it is exercising only its private corporate rights and powers.

With this definition of the character of the undertaking and the relationship of the city to it clearly fixed in mind, it will be profitable to recur again to the language of Section 14 of the Labor Law. That section provides:

> "In the construction of *public* works, by the state or a municipality or persons contracting with the state or such municipality, only citizens of the United States shall be employed." (Italics ours.)

Clearly the Legislature had in mind that municipalities construct both works which are "*public*" and works which are not "*public.*"

Otherwise no meaning or effect can be ascribed to the use in the statute of the word "public."

This is contrary to the universally accepted canon of statutory construction, that every word must be deemed to have a purpose and meaning, if possible.

Sutherland on Statutes and Statutory Construction, Sec. 380.

A reference to §3 of the Labor Law, regulating the hours of labor and providing for the payment of the prevailing rate of wages, will show the Legislature had the same distinction in mind between *public* work and work of a *private* character. It distinctly limits the application of the section "to such public work."

In a sense, of course, subway construction is public work, in that it is intended for the convenience of the public, but it is no more public than any other railroad construction.

The intention of the legislature in using the word is not far to seek. When the Labor Law was enacted, the courts generally had frequently taken occasion to distinguish between the *public* and the *private* works of municipalities, and the distinction was well established.

The opinion of INGRAHAM, P. J., in the Appellate Division of the Supreme Court, in which MCLAUGHLIN, J., concurs with convincing clearness and apt illustration, shows why the statute was not intended to, and does not, apply to the subway contracts in question. We confidently refer to it as unanswerable in its reasoning and conclusions.

The main opinion, by SCOTT, J., also briefly and forcibly reviews the point and reaches the conclusion that there is "much ground for saying "that * * * the State * * * has no more "power to impose such a test" (the test of citizenship) "upon persons employed in building

"a subway for the City than it would have if the "subway were being constructed by a private cor- "poration or individual;" but says it is not necessary to decide the point, since the conclusion at which the court had arrived on the other branch of the case required a reversal of the judgment.

As cogently supporting these views, see also the authorities cited under Point I (pages —, — and —) of this brief, showing that contracts made by a city "in its capacity of a private corporation," although the public may have an ultimate interest in the convenience and service it may derive therefrom, are in reality private.

In the *Dartmouth College* case (4 Wheat., 517), MARSHALL, C. J., in discussing that part of the tenth section of Article I of the Constitution of the United States which provides that "no state shall pass * * * any law impairing the obligation of contracts," says (at page 629):

> "The provision of the constitution never has been understood to embrace other contracts, than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the legislature on the subject of divorces."

By a parity of reasoning, we submit, the words "public contracts" in the statute in question should be limited in their application to such contracts as the municipality may enter into as a governmental agent.

It is not an answer, we submit, to say that words in a statute are assumed to be used in their broadest meaning and, therefore, that the accepted meaning of the word "public" could comprehend subway construction. Unless the

word "public" as employed by the statute is so construed as to contradistinguish it from the word "private," it can have no meaning whatever.

Indeed, as is pointed out in the *Cossey* case (179 N. Y.), *supra*, and other cases in the Court of Appeals, the Labor Law does not apply in cases where the work is not done directly by the city, but through an independent contractor, for the reason stated—that

> "where the municipality lets work by contract, it is interested only in the result obtained and, if that result complies with the requirements of the contract, it is immaterial to the city what the contractor's employees may have been paid, or how long they have worked."

Even if Section 14 of the Labor Law was ever intended to apply to works of a municipality undertaken by it as a proprietor, it was, so far as subway construction in the City of New York is concerned, in effect repealed, or in fact superseded by the Rapid Transit Act and the Amendments to that act.

Chapter 226 of the Laws of 1912, amending the Rapid Transit Act, in terms and in detail, authorized every act of the Public Service Commission and the Board of Estimate and Apportionment leading up to the execution of the contracts between the Interborough Company and the City and the New York Municipal Railways Corporation and the City. The provisions of those contracts, as set forth in the complaint, are well within the terms of said act. (See particularly Sections 5, 6, 7, 8, 9 and 16.)

The court will presume that the legislature

had all the facts before it and intended that its act conferred the necessary power to carry out the purposes which the parties and the legislature had in mind.

Patsone v. Pennsylvania, 232 U.S., 139.

By the acts of the Legislature mentioned, power is given the Public Service Commission in conjunction with the Board of Estimate and Apportionment to estimate and determine upon the probable cost of carrying out the plans of subway extensions and construction which they already had determined upon and approved. They were also authorized to, and as a matter of fact did, prescribe the period of time within which these contracts and plans must be completed, so as to provide for the City, fully equipped, the subway system determined upon. Contracts pursuant to that act legally provide that the Interborough Company, in regard to the one part of the Dual System, shall supply a large part of the money required for that purpose, and its interests are secured by detailed provisions as to how it shall be repaid for the funds supplied by it, both for necessary construction and equipment for operation.

The same is true as regards the other part of the Dual System embraced in the contract with the New York Municipal Railway Corporation.

It must be clear, therefore, that if the Rapid Transit Act, as amended, authorizing the making and carrying out of the plans and contracts referred to for this Dual System of rapid transit, can be interfered with or defeated by a pre-existing law, namely, §14 of the Labor Law, then the one law is in direct conflict with the

other. If that be true, the earlier law must yield as being wholly inconsistent with the provisions of the later one.

If the requirement of §14 of the Labor Law that alien labor may not be employed makes it impossible to construct and equip the system authorized by the Rapid Transit Act and will defeat the accomplishment of the purposes of that act, and this fact is proven or admitted (as it is in the case of the demurrer, Record, p.), then we respectfully submit that the Rapid Transit Act either in fact repeals §14 of the Labor Law, because of the conflict between them, or plainly supersedes it.

It is a settled canon of statutory construction that where an act is complete and comprehensive in itself, covering the entire subject to which it relates, it is controlling, so far as it may in any way conflict with a pre-existing statute enacted for another purpose, even though the pre-existing statute may specifically apply to the subject in question.

Schieffelin v. McClellan, 135 A. D,. 665;
Hechmann v. Pinkney, 81 N. Y., 211;
Excelsior Petroleum Co. v. Lacey, 63 id., 422;
People v. Gold & Stock Tel. Co., 98 id., 67;
New York Cable Co. Mayor, etc., of N. Y., 104 id., 1, 15.

As Scott, J., says in the *Schieffelin* case (at page 669):

> "It is a well established rule of statutory construction that a later special statute which covers the whole subject matter

> of an earlier general statute, and which, although not repugnant to the earlier statute, embraces new and more specific provisions, will be held to have been intended, within the scope of its operations, as a substitute for and a repeal *pro tanto* of the earlier general act."

And, as McLaughlin, J., says, though dissenting, in the same case (page 672):

> "No one, I take it, disputes the proposition that a general statute may be repealed by a special one subsequently passed and inconsistent therewith, or entirely covering the same subject matter."

It is the rule also that different statutes should be so construed that each may stand and serve its proper function, if such construction be possible, and that efforts will be made to harmonize the provisions of statutes so as to prevent conflict and give the provisions of each effect, if it can reasonably be done.

Woods v. Supervisors of Madison Co., 136 N. Y., 403;
Ackerson v. Supervisors of Niagara Co., 72 Hun, 616;
Cooley on Constitutional Limitations, 7th Ed., p. 255.

In *Woods v. Supervisors, supra,* at page 409, O'Brien, J., says:

> "When some office or function can by fair construction be assigned to both acts and they confer different powers, to be exercised for different purposes, both must stand." (*Citing People, etc., v. N. Y. C. P.*, 101 N. Y., 195.)

When, therefore, the Legislature, in the Rapid Transit Act and the amendments thereof, re-

ferred to, conferred upon the Public Service Commission and the City authorities power to make the plans and contracts for the extension of rapid transit hereinbefore referred to, it may, and in fact must be, assumed that it did not deem the provisions of the Labor Law to be in any way in conflict therewith; or, if it did, it regarded them as superseded in so far as rapid transit was concerned, as it would be unreasonable to suppose that the Legislature would authorize by the Rapid Transit Act and its amendments what an existing statute, if construed as claimed by the defendants, and applied to conditions which are matters of common knowledge, would make impossible to realize or carry out; in short, would defeat and render futile what the Legislature in terms authorized to be done.

Great, if not controlling, weight is given to this point by the practical construction placed upon both acts by the city authorities from the time of the passage of the Rapid Transit Act (1891) to the present time, as well as by the various contractors with whom the city contracted for the construction of subways, in carrying out the provisions of that act, also by the various subcontractors employed by contractors. It is asserted in the complaint (and this assertion cannot be successfully challenged), that during that whole period no question was ever raised in regard to the right of the city, or any contractor or subcontractor with it engaged in subway construction, to employ alien labor or their right to employ on any of said works citizens from other states without first giving preference to citizens of the State of New York. (Record, pp. 17 to 20.)

The first contract, called contract No. 1, entered into between John B. McDonald and the city, was dated September, 1900, and called for

subway construction to cost about thirty-five millions of dollars. McDonald and his assignee, the Rapid Transit Subway Construction Company, were engaged in the carrying out of that contract and the completion of the system of rapid transit called for by it from about September, 1900, to October, 1904. An extension of the same, costing upwards of two millions of dollars was later let and completed under Contract No. 2. Different sections of the routes were sublet and the work done by other contractors. From the start and throughout the performance of the work required in carrying out said contracts, alien labor was employed to a very large extent, as were citizens of other states, without reference to any right of preference on the part of citizens of the State of New York. Section 14 of the Labor Law existed then in the same form in which it now is. Its provisions were not invoked by any one, nor was it in any way suggested that its prohibition against the employment of alien labor or the preference which it attempted to give to citizens of this State over citizens of other states had any application (Record, pp. 17 to 20).

Later, when the Dual System was undertaken and the plans and contracts let therefor, as stated in the complaint, and the work begun by the various contractors and prosecuted to the great extent shown in the complaint, again no question was raised, until within a very short time, that said section of the Labor Law had any application (Record, pp. 17 to 20).

When the probable cost of the Dual System was estimated and determined by the Public Service Commission and the Board of Estimate and Apportionment, it is plain that the provisions of said Labor Law were not deemed to ap-

ply, nor were they when the contracts were entered into by the Interborough Company and the New York Municipal Railway Corporation for construction and equipment.

In those contracts, no reference whatever is made to Section 14 of the Labor Law.

The complaint alleges as a fact, which is admitted by the demurrer, that contractors in submitting bids and entering into contracts did so on the belief and assumption that Section 14 of the Labor Law was unconstitutional and void or did not apply. (Record, p. 19.)

It must be clear, therefore, that the City and every contractor, when the contracts were let, assumed the contractors had the right to employ such labor necessary for its performance as they chose and found available.

We then have a situation in which it appears that public officials, as well as private corporations and individuals, placed a practical construction upon the statutes to the effect that the Rapid Transit Act either repeals or supersedes §14 of the Labor Law, or else that the same is unconstitutional and void or did not apply to said contracts.

In the two instances in which the question was raised in other parts of the State of New York, and in regard to work of another character being done under municipal contracts, the courts held that §14 of the Labor Law was unconstitutional and void.

> *People v. Warren*, 13 Misc., 615;
> *People v. Luddington, Sons Inc.*, decided at the Orleans County Court in December, 1911.

In the *Luddington* case, the indictment was dismissed on the ground of the unconstitutional-

ity of §14 of the Labor Law, although Judge Signor, before whom the case was tried, had previously rendered an opinion which sustained §14 (See 74 Misc., 363).

It seems to be well settled that practical construction is a doctrine that applies not only to contracts, but also to statutes and even to the constitution itself.

City of New York v. New York City Ry. Co., 193 N. Y., 543.

In that case, the question before the court, was as to the amount of a license fee which should be paid by the defendant railway company to the city. The defendant's charter provided for

> "the payment to the city of the same license fee annually for each car run thereon as is now paid by other railroads in said city."

It appeared upon the trial that at the time of the granting of the franchise to the defendant no railroad in The City of New York paid car license fees computed "on the basis of each and every car run by it during the year," but if they paid any license fee at all, paid "on the "basis of the greatest number of cars in daily "use by the company at the busiest season of "the year," and that for over forty years the defendant and its predecessors had paid license fees for cars operated under its franchise upon the latter basis only. The court says (page 548):

> "Under these circumstances the practical construction of the parties by a uniform course of conduct under all administrations of the city government for more than forty years is of controlling importance. When the parties to a contract of doubtful meaning guided by self-interest, enforce it for a

long time by a consistent and uniform course of conduct, so as to give it a practical meaning, the courts will treat it as having that meaning, even if as an original proposition they might have given it a different one. (*Wolsey v. Funke,* 121 N. Y., 87, 92; *Syms v. Mayor, etc. of N. Y.,* 105 N. Y., 153, 157; *French v. Carhart,* 1 N. Y., 96, 102; *Livingston v. Ten Broeck,* 16 Johns, 14, 22). So, when the meaning of the statute is doubtful, a practical construction by those for whom the law was enacted, or by public officers whose duty it was to enforce it, acquiesced in by all for a long period of time, in the language of Mr. Justice Nelson, 'is entitled to great if not controlling influence.' (*Chicago v. Sheldon,* 9 Wall., 50, 54). In *People ex rel. Williams v. Dayton* (55 N. Y., 367), the practical construction of a doubtful statute by the legislative and executive departments, continued for many years, was held to have 'controlling weight in its interpretation.' To the same effect is the case of *Power v. Village of Athens* (99 N. Y.). It is held to have great weight even in the construction of the constitution itself. (*People v. Home Ins. Co.,* 92 N. Y., 328, 337; *People ex rel Einsfeld v. Murray,* 149 N. Y., 367, 376.)"

In *Rogers v. Goodwin* (2 Mass., 475 at p. 477), it is said:

"Were the court now to decide that this construction is not to be supported, very great mischief would follow. And although, if it were now *res integra,* it might be very difficult to maintain such a construction, yet at this day the *argumentum ab inconvenienti* applies with great weight. We cannot shake a principle which in practice has so long and extensively prevailed. If the practice originated in error, yet the error is now so common that it must have the force of law. The legal ground on which this provision is

> now supported is, that long and continued usage furnishes a contemporaneous construction, which must prevail over the mere technical import of the words."

In *Rathbone v. Wirth*, 150 N. Y., 459, GRAY, J., says (page 476):

> "Practical construction of a law is usually accorded force when it relates to the business conducted by the departments of the State government and when the legislation depended upon to establish it has been clear and uniform in character for a long period of time."

There is one stipulation in the contracts themselves which indicates strongly that the city authorities regarded the provisions of Section 14 of the Labor Law as inapplicable to the construction contracts or, if applicable to the construction contracts, as void.

> "If this contract contains any unlawful provision not an essential part of the general structure of the contract and which shall not appear to have been a controlling or very material inducement to the making thereof, the same shall be deemed of no effect and shall upon the application of either party be struck from the contract without affecting the binding force of the contract as it shall remain after omitting such provision."

There is no stipulation in the contract upon which the above quoted provision can operate, other than the stipulation that the contractor will obey the provision of Section 14 of the Labor Law.

In this connection it is also well to note that as to Section 3 of the Labor Law, providing for an eight hour day for employees and the pay-

ment to them of the prevailing rate of wages, the contractor makes absolute and unqualified stipulation to obey the terms of the section, whereas in the case of Section 14, his agreement is "in obedience to the requirements of" the section he will obey its provisions.

The absence of any covenant whatever with regard to Section 14 of the Labor Law, in the Interborough and New York Municipal Railway Corporation contracts, as above pointed out, plainly indicates a practical construction of all the contracts awarded for the purpose of consummating the comprehensive scheme of rapid transit intended, to the effect that Section 14 did not apply to them. The stipulation as to Section 14 of the Labor Law was inserted in the construction contracts, only because of the direct command of the statute and without regard to its binding force.

In final analysis, the purpose of the contracts was to secure the construction of a rapid transit railroad system which, while being constructed, is, and, when operated, will be, in the nature of a joint venture between the city and the Interborough Company in the one instance, and the city and the New York Municipal Railroad Corporation, in the other instance. Describe the venture as one may, teminology will not change its effect. The city in its private or non-governmental capacity was binding itself to spend the money of itself and two private corporations with a view toward reaping revenue and profit, and the Legislature has no more right to interfere to regulate the method or amount of the disbursements that should be made by the city, and upon which the railroad corporations were obliged to pay an interest charge before acquiring the right to retain a portion of the profits,

(Record, pp. 14, 15) than it would have to regulate or interfere with the amount of the disbursements that should be made by such private corporations themselves, and no such intention will be imputed to the legislature. It is evident under the circumstances that neither the contractors nor the city believed that Section 14 of the Labor Law was applicable to the contracts and plans which the legislature had approved and the city had entered into.

Estoppel or Waiver.

Indeed, it would not seem unreasonable to invoke the application of somewhat kindred principles, which lie at the foundation of both the doctrine of estoppel, and the doctrine of waiver.

Upon the facts appearing and the situation resulting from the action and acquiescence of all parties it may well be held that both city and objecting taxpayers are estopped from insisting on a forfeiture of the contracts or else that they have waived the right to raise any question as to their validity now. It will be borne in mind that Section 59 of the City Charter set forth in point (*infra*), as well as Section 51 of the Municipal Law gave every resident of the city who is a taxpayer a right of action to prevent illegal acts, whether of omission or commission, by city officers or abuse of trust by them. When they omitted to enforce the labor law, if it was valid, and certified estimates and paid them to contractors whose violation of the law was a matter of common knowledge to them and to the public, the city and every citizen who remained silent, will not be heard to complain now.

The courts have even applied this principle, underlying both the doctrine of estoppel and the doctrine of waiver, to an attack upon the constitutionality of a statute, and held that mere acquiescence will deprive taxpayers of the right to challenge its constitutionality.

Matter of Reynolds, 202 N. Y., 430.

In that case the court held that after four general elections under the apportionment act of 1907, it was too late for a taxpayer to attack the constitutionality of the act, that the right to challenge the act had been lost by laches.

See also

Kiernan v. Dutchess Co. Ins. Co., 150 N. Y., 190;
Draper v. Oswego Co., Fire Relief Assn., 190 N. Y., 12;
Clark v. West, 193 N. Y., 349.

In *Clark v. West,* the plaintiff had undertaken to write a law book for the defendant. The terms of payment were as follows: Two dollars per page in any event, and, if the plaintiff abstains from the use of intoxicating liquors during the period in which he is engaged in writing the book, six dollars per page. The court found that there had been an express waiver of the conditions precedent to the payment of six dollars per page and, in answer to the defendant's argument that there was no consideration to support the waiver and, that the waiver, therefore, was not binding, said, at page 359:

> "The waiver is not of the consideration or subject matter, but of an incident to the method of performance. The consideration remains the same. The defendant has had the work he bargained for * * *

> He might have insisted on literal performance and then he could have stood upon the letter of his contract. If, however, he has waived that incidental condition, he has created a situation to which the doctrine of waiver very precisely applies. * * * A waiver has been defined to be the intentional relinquishment of a known right. It is voluntary and implies an election to dispense with something of value, or forego some advantage which the party waiving it might, at his option, have demanded or insisted upon."

In *Draper v. Oswego Co., Fire Relief Assn.* (190 N. Y., 12), the question before the court was as to the right of recovery by the insured upon a policy of insurance providing that the company should not be liable if fire was used in any building upon the premises, within one hundred feet of any insured building, for the purpose of making sugar, or stripping tobacco or curing hops or drying apples. He had used a fire within the prohibited area. The trial judge had charged that lighting the fire was a breach of the condition of the policy and that the plaintiff could not recover unless the defendants had waived that breach. After pointing out that the doctrines of waiver and of equitable estoppel are often confused in insurance litigation, CULLEN, C. J., says at page 16:

> "A waiver is a voluntary abandonment or reliquishment by a party of some right or advantage. As said by my brother Vann in the *Kiernan* case, 'the law of waiver seems 'to be a technical doctrine, introduced and 'applied by the courts for the purpose of de-'feating forfeitures. * * * While the 'principle may not be easily classified, it is 'well established that, if the words and acts 'of the insurer reasonably justify the con-'clusion that, with full knowledge of all the

'facts, it intended to abandon or not to insist 'upon the particular defense afterwards re- 'lied upon, a verdict or finding to that effect 'establishes a waiver which, if it once exists, 'can never be revoked.' The doctrine of equitable estoppel, or estoppel *in pais*, is that a party may be precluded by his acts and conduct from asserting a right to the detriment or prejudice of another party who, entitled to rely on such conduct, has acted upon it. The rule prevailing in this state, that an insurance company will not be permitted to defeat a recovery on a policy issued by it by proving the existence of facts which render it void, where it had full knowledge of the facts when the policy was issued, rests rather on the doctrine of estoppel than on that of waiver."

In the same case the court approved the charge of the trial judge as follows (p. 15):

> "A waiver may be made by express language to that effect or the company may make such a waiver by acts from which the intention to waive may be inferred or from which a waiver follows as a legal result. Where, after knowledge of the forfeiture of a policy, the insurer recognizes its continued validity, does acts based thereon and requires the insured by virtue thereof to do some act or incur some trouble or expense, the forfeiture is, as a matter of law, waived and such a waiver need not be based upon any new agreement or upon estoppel. It exists when there is an intention to waive unexpressed, but clearly to be inferred from the circumstances; or, when there is no such intention in fact, but the conduct of the insurer has misled the insured into acting upon a reasonable belief that the company has waived some provision of the policy."

It will be seen, therefore, that while there is a clear distinction between waiver and estoppel,

one of the fundamental elements in each is an act by one party done in reliance upon the act or omission of another party and resulting in a change in the situation of the first party with reference to the second party; or, in other words, which will result in damage to the first party, unless the act or omission of the second party is held to preclude him from asserting the rights which accrued to him out of the situation existing prior to the act or omission relied upon by the first party.

In the present case, by acquiescence in the course and practice of employing aliens and citizens of other States, upon the theory that Section 14 of the Labor Law is either unconstitutional, or does not apply to subway construction contracts, the City and its officials are precluded, at this late day, from asserting either its constitutionality or its application to the subway construction contracts.

VI.

The covenant in the construction contracts to comply with Section 14 of the Labor Law is not binding on the contractors, if the law itself is invalid because it conflicts with the constitution or with treaty provisions.

The covenant is as follows:

> "In obedience to the requirements of sec-
> "tion 14 of the Labor Law, it is further pro-
> "vided that, if the provisions of the said sec-
> "tion 14 are not complied with, this contract
> "shall be void."

The language of this covenant is so framed as of itself to indicate that, if the provisions of section 14 of the Labor Law are invalid, that section should be treated as if it does not exist. That it is invalid seems to be well established by authority. Covenants much stronger in terms have been held to fall with a statute whose provisions were incorporated in the covenant.

People ex rel. Rodgers v. Coler, 166 N. Y., 1;
People ex rel. North v. Featherstonhaugh, 172 N. Y., 112;
Knowles v. The City of New York, 176 N. Y., 430.

As O'Brien, J., says in the *Rodgers* case, at page 9:

> "The fact that certain provisions of the Labor Law were actually incorporated into the contract as signed by the contractor, cannot change or add anything to the strength of the position assumed by the city. * * * If the law is valid, it governs the contract and the rights of the parties whether actually incorporated into the writing or not, since all contracts are assumed to be made with a view to existing laws on the subject. If it is not valid, the contractor has not made it so by stipulating in writing to obey it and prescribing the penalty for his own disobedience, which is the forfeiture of all rights under the agreement. *It is not in the power of the legislature to protect an invalid law from judicial scrutiny by providing that it must receive the assent of the parties to every contract to which it relates.*
> * * * * * * * *
> "Courts, in such cases, are not bound by mere forms, but must look at the substance of things, and, so viewing this transaction,

it would be idle to attempt to deceive ourselves with the idea that the question involved in this appeal arises out of the stipulations of the parties to the contract, or is governed by them rather than the provisions of a statute. The contract *is in the form that we find it not because the parties so elected to contract, but for the reason that the statute would not permit them to contract in any other way.*" (Italics ours.)

In the *North* case, *supra,* while the stipulation in a city paving contract was limited to compliance with such provisions of the Labor Law as were "in force," the decision of the court is put upon the broad general ground taken by O'Brien, J., in the *Rodgers* case.

In *Meyers v. City* (58 A. D., 534), the court in discussing the right of the Bridge Commissioner to insert in a contract for bridge construction a stipulation for compliance by the contractor with Sections 3 and 13 (now 14) of the Labor Law, says (at p. 538):

"It is alleged in the complaint that these requirements tended to increase the price of the work by compelling the contractor to pay a greater amount for the labor employed by him than he otherwise would be compelled to do, *if allowed to pay wages for labor regulated only by the law of supply and demand,* and if he were not restricted in the employment of labor by preferring citizens of the State of New York. *These allegations are admitted by the demurrer.* Therefore, we have this condition of affairs, that the law imposed upon the Bridge Commissioners the duty of requiring that their contractors, as a condition of making the contract to do work upon the bridge, should agree to pay the prevailing rate of wages and employ citizens of the State of New York; that the law com-

> pelling such requirements is unconstitutional (*People ex rel. Rodgers v. Coler,* 166 N. Y., 1); that the effect of it is to unduly increase the price necessarily to be paid; and it necessarily follows, as it seems to me, that the insertion of any requirement in a contract, which unduly increases the price to be paid for the work, operates as a waste of the public money." (Italics ours.)

In *Insurance Company v. Morse* (20 Wall., 445), the statute of the State of Wisconsin requiring foreign insurance companies doing business in that state to appoint an attorney in the state upon whom process might be served and to agree that such company would not remove any suit into the United States Circuit or Federal Courts was held to be void. It was further held that the agreement fell with the statute.

The Court said at page 458:

> "The agreement of the insurance company derives no support from an unconstitutional statute and is void, as it would be had no such statute been passed:

The same result is reached by the Ohio courts.

> *City of Cleveland v. Clements Bros. Construction Co.,* 67 Ohio St. Rept., 197.

In that case, in answer to the argument that the contractor was not obliged to bid and did so voluntarily and with full knowledge of the objectionable provisions in the proposed contract, and "assumed the obligations and conditions imposed by the statute." The court says at page 220:

> "It would perhaps be a sufficient answer to this claim of plaintiff in error to say that

> the stipulation referred to became a part of the contract not because of any voluntary agreement between the parties that it should be inserted therein, but because the statute *forcibly* injected it."

Even if Section 14 of the Labor Law is declared unconstitutional and void and the covenant to comply with it contained in the construction contracts is also declared void, the contracts are not rendered void, but are, aside from that covenant, in all respects valid and effective.

The contingency that there might be an invalid stipulation in the contracts was in the minds of both the contractors and the City authorities and expressly provided against.

One of the covenants reads:

> "If this contract contains any unlawful provision not an essential part of the general structure of the contract and which shall not appear to have been a controlling or very material inducement to the making thereof, the same shall be deemed of no effect and shall upon the application of either party be struck from the contract without affecting the binding force of the contract as it shall remain after omitting such provision."

As we have pointed out above (Point V, page 202) here is no provision in the contract to which the last mentioned covenant can be applied unless it be the covenant for compliance with Section 14 of the Labor Law.

Indeed it was so held in the *Rodgers* case (166 N. Y., 1).

If the stipulation in the contract to comply with the provisions of section 14 of the Labor Law, that is, to employ no aliens and to prefer among laborers those who are citizens of the State of New York, be considered without regard to

the terms of section 14 of the Labor Law requiring the insertion of the stipulation, and be considered merely as a stipulation inserted by the City on its own authority, it is manifestly invalid, not only for all the reasons set forth above with regard to section 14 of the Labor Law, as a legislative enactment in violation of the Constitution, but for the further reason that it is against public policy and in restraint of trade and competition and prevents free and unrestricted bidding upon municipal works.

Davenport v. Walker, 57 App. Div., 221;
People ex rel. Single Paper Co., Limited v. Edgecomb, 112 App. Div., 604;
Inge v. Board of Public Works, 135 Ala., 187;
McChesney v. The People, 200 Ill., 146;
Sweet v. The People, 200 Ill., 536;
Glover v. The People, 201 Ill., 545;
City of Chicago v. Hulbert, 205 Ill., 346.

In the *Davenport* case (*supra*) the Board of Supervisors of the County of Albany had inserted in a contract for the construction of a reception pavilion the stipulation that the contractor should employ only union labor. The lowest bidder refused to accept a contract with this stipulation in it and the contract was let to another. The reason assigned for the insertion of this clause was "that there was great need for the comple-"tion of said pavilion and that * * * they" (the supervisors) "were persuaded that if an at-"tempt was made to employ any mechanics upon

"any part of the work thereof who did not be-
"long to such trades organization, it would result
"in a strike by those who did, and thus delay the
"whole work and cause greater expense in the
"end to the county than would the acceptance of
"the larger bid."

The Court said, at page 225:

> "The action of the defendants in this case in demanding that none but members of the organization be employed upon this work, was an act so clearly against public policy and so violative of constitutional rights and of the first principles of our form of government, that it should not be for a moment tolerated nor permitted to excuse or justify any acts of theirs."

In the *Single Paper Co.* case, the relator had petitioned for a writ of mandamus against the Board of Supervisors of Onondaga County to compel them to accept a bond for the due execution of a contract for public printing. The specifications contained the statement that the "Allied Printing Trades Council label is required to be used." The relator submitted a bid which was the lowest and was formally accepted by the Board. Then the relator prepared a bond with that clause omitted, and the supervisors refused to accept it. The court held that mandamus would lie; that the stipulation in the contract was void as against public policy. The Court says, at page 606:

> "The policy of the law is to prevent any discrimination of this kind by public officials, and the courts, so far as our research extends, have unvaryingly condemned this attempted violation of our fundamental law. The enactments which in recent times have found their way upon our statute books in-

tended to discriminate for or against any particular class of people or to restrict the freedom of contract have been repeatedly held to trangress the constitutional rights of the citizen. (*People v. Gillson*, 109 N. Y., 389; *Curran v. Galen*, 152 id., 33; *People ex rel. Tyroler v. Warden of Prison*, 157 id., 116; *Schnaier v. Navarre Hotel & Importation Co.*, 182 id., 83; *Wright v. Hart*, id., 330; *Lochner v. New York*, 198 U. S., 45; *People ex rel. Appel v. Zimmerman*, 102 App. Div., 103.)

* * * * * * * *

"The only way open to the relator, therefore, was to proceed upon the assumption that the supervisors would not insist upon the illegal clause if their intention was directed to it, or that said clause was surplusage. The relator adopted that course, but the board were still persistent in adhering to the form of their specifications. The relator is entitled to the benefit of his agreement unless other printers refrained from bidding because of the vicious clause or for some other tangible reason."

We submit that there is and can be no objection to the inclusion of a union labor clause which will not in reason apply to the inclusion of a citizen labor clause. The supply of labor is limited and its cost enhanced.

In *Inge v. Board of Public Works* (135 Ala., 187), the question before the court was whether the including of a stipulation in a construction contract, let after public bidding, against the employment by the contractor of alien or convict labor, rendered the contract void. The court held in the affirmative.

At page 202, the Court says:

"The stipulation in the contracts against the employment by the contractor of alien or convict labor presents a question which

has received consideration in a number of cases in the courts of the country. This condition was contained in the specifications, which form the basis of the bids called for. It narrowed the field for the employment of labor, and was a restriction upon the contractor that naturally tended to make him increase the price of his bid. Such a limitation is directly opposed to the interest of the taxpayer, who is entitled to have the work done at the lowest cost. The authorities are generally agreed that such a provision invalidates the contract. The following cases discuss the principle here involved and contain citations of other authorities: (*People v. Coler*, 82 Am. St. Rep., 605; *Baker v. Portland*, Fed. Cas., 777; *People v. Warren*, 34 N. Y. Sup., 942; *Holden v. City of Alton*, 179 Ill., 323.)"

In *McChesney v. The People* (200 Ill., 146), the question before the court was as to the validity of the following clause inserted in the contract on a municipal work:

"Alien labor prohibited—it is hereby un-
"derstood and agreed that said contractor or
"contractors shall not employ, nor permit to
"be employed by his or their subcontractors
"any person or persons other than native
"born or naturalized citizens of the United
"States."

The Court says, at page 151:

"It is a material and important right of the property owner that there shall be free and open competition, unrestricted by illegal and unconstitutional provisions, the natural tendency of which would be to increase the cost of the work, and it is undeniable that the clauses in question in this case lay down rules which would naturally increase such cost and be detrimental to the public."

See also:

Sweet v. People, 200 Ill., 536;
Glover v. People, 201 Ill., 545;
City of Chicago v. Hulbert, 205 Ill., 346.

In *The City of Chicago v. Hulbert,* the court says, at page 363:

"It is now insisted by appellees that the proceedings are void and that this ordinance cannot be sustained because paragraph 10 of chapter 6 of our statutes, entitled 'Aliens,' was not complied with. (Hurd's Stat., 1901, p. 141.) That paragraph provides that 'it shall be unlawful for any * * * officer * * * acting for * * * * * * any city * * * or any contractor, or subcontractor, under any or either of said municipalities, to employ any person or persons, other than native born or naturalized citizens, or those who have in good faith declared their intentions to become citizens of the United States, when such employees are to be paid, in the whole or in part, directly or indirectly, out of any funds raised by taxation.' Paragraph 11 of the same statute requires that any one employing labor to be paid out of the public funds, to make a list of the persons so employed, showing that they meet the requirements of the foregoing paragraph and paragraph 12 fixes a penalty for a violation of paragraph 11. Appellees took evidence showing that this statute was not complied with, and insist that as these public funds go to the contractor who violated that law, the ordinance cannot be sustained. A similar law was enacted by ordinance in the City of Chicago, and we have repeatedly held that such law is invalid, as it is in contravention of the constitution and the right of individuals to contract. The statute in question is

void upon the same grounds, and neither the city nor the contractor was under any obligation to observe it."

VII.

An action may be maintained by a taxpayer to enjoin an official, or threatened official act, upon the ground of illegality simply, or to enjoin an official act which will result in waste or injury to the public.

In the opinion of the Court of Appeals no question is raised with regard to the right of the plaintiff-in-error Heim to maintain this action. This right must, under the authorities, be conceded.

General Municipal Law, Sec. 51;
Code of Civil Procedure, Sec. 1925;
Charter of The City of N. Y., Sec. 59;
Admiral Realty Co. v. Gaynor, 206 N. Y., 110;
New Orleans v. New Orleans Water Works Co., 142 U. S., 79, 93, 131;
Rathbone v. Wirth, 150 N. Y., 459;
Gage v. City, 110 A. D., 403;
Ziegler v. Chapin, 126 N. Y., 342;
Warren v. Baldwin, 105 A. D., 534;
Hicks v. Eggleston, 105 A. D., 73;
Peck v. Belknap, 130 N. Y., 394;
Hopper v. Wilcox, 155 A. D., 213;
Brill v. Miller, 140 A. D., 602;
Davenport v. Walker, 57 A. D., 221;
Rogers v. Supervisors, 77 A. D., 501;
Wenk v. City, 171 N. Y., 607;
Perkins v. Stimmel, 114 N. Y., 358, 368 to 369.

The language of the taxpayer's statute, *General Municipal Law*, Sec. 51, is:

> "All officers, agents, commissioners and other persons acting, or who have acted for or on behalf of any county, town, village or municipal corporation in this state, and in each and every one of them, may be prosecuted and an action or actions may be maintained against them;
>
> (1) to prevent any illegal official act on the part of any such officers, agents, commissioners or other persons, or
>
> (2) to prevent waste or injury to, or
>
> (3) to restore and make good any property, funds or estate of such county, town, village or municipal corporation." (numbering ours)

Section 59 of the *City Charter* provides:

> "The board of aldermen and the several members thereof and all officers and employees of the city are hereby declared trustees of the property, funds and effects of said city respectively, so far as such property, funds and effects are or may be committed to their management or control, and every person residing in said city, when authorized to pay taxes therein, and who shall pay taxes therein is hereby declared to be a *cestui que trust* in respect to the said property, funds and effects, respectively; and any co-trustees, or any *cestui que trust*, shall be entitled, as against said trustees, and in regard to said property, funds and effects, to all the rights and privileges provided by law for any co-trustee or *cestui que trust* to prosecute and maintain any action to prevent waste and injury to any property, funds and estate held in trust. Such trustees are hereby makes subject to all the duties and responsibilities imposed by law on trustees, and such duties and responsibilities may be

enforced by the city or by any co-trustee or *cestui que trust* aforesaid."

As was held in *Brill v. Miller* (140 App. Div., 602), the threatened public injury resulting from illegal acts, which may be prevented or restrained, need not necessarily be such as may be (p. 607)

> "measureable in dollars and cents. There may well be public interests which a taxpayer is interested to conserve, which relate to the general public welfare and which ought to be protected, and which should, in the first instance, be conserved by some public officer. In such a case, if the officer, who should protect the public interest, refuses or neglects to do so, the statute authorizes the intervention of a taxpayer."

In *Warren v. Baldwin, supra,* FINCH, J., says:

> "The statute assumes that any illegal official act is or may be injurious to a corporation when done by its servants and allows him (the officer) to be restrained simply because of the illegality."

The complaint shows both generally and in ample detail, the injury and waste that will be brought upon the public if the contracts in question are improperly terminated, or the cost of their performance increased by a great diminution of labor available for their performance, as more fully appears in the discussion.

The Taxpayers' Act, under which this action was brought, is a remedial statute and is to be liberally construed for the protection of taxpayers.

> *Queens County Water Co. v. Monroe,* 83 App. Div., 105;
> *Gage v. The City of New York,* 110 App. Div., 403.

The direct and necessary consequence of the illegal action of the Public Service Commission will be great inconvenience and incalculable waste and injury to the property, funds, and estate of The City of New York.

The rule laid down in *Ayres v. Lawrence* (59 N. Y., 192), an action in which the complaint was verified a little more than twenty days after the original taxpayer's act of 1872 became a law, has been frequently approved and amply supports the plaintiff's right to maintain this action.

VIII.

The prevailing and concurring opinions in the Court of Appeals.

While these opinions were written in the case of *People v. Crane,* they were written to cover both that case and this, the reversal of which was based upon that opinion. (See *Heim v. McCall,* 214 N. Y., 629, 630. Also language of the opinion. Crane case, Record, p. 87 .) It must not be overlooked, however, that there is an important distinction between the Crane case and this, in that in the Crane case the work involved was the construction of a sewer basin by the city, a work which could have been done by the state or the city in the exercise of a governmental function.

The prevailing opinion written by Cardozo, J., is based practically upon the single ground that moneys applied to the construction of the city subways belong to the state and hence that it may discriminate against citizens of other states or aliens in the right to share in such moneys through employment upon subway construction work. It is true that he also asserts (Record, p. 90) that the legislative motive in the enactment

of Section 14 of the Labor Law as construed by the court might be justified on the ground that it would tend to prevent pauperism of citizens of the state. To this extent it may be said the learned judge invokes the police power. We respectfully submit, however, that such a consideration is too far-fetched to have force. It implies the right of the state to enrich one class of its citizens by imposing increased burdens upon all others. This doctrine we submit is both economically and legally unsound. With regard to the other ground mentioned, we have attempted to show (See p. 89, et seq., of this brief) it is equally unfounded as the state has no title to or interest in the moneys required and provided by the city for the establishment of a rapid transit system.

The case of *Pastone v. Pennsylvania*, 232 U. S., 139, much relied on below, in which a statute of the State of Pennsylvania making it unlawful for unnaturalized aliens to kill game, and to that end preventing their having possession of shot guns or rifles, was invoked, we submit, lays down no principle in which the judgment appealed from may find support. This court held that the statute was not repugnant to the Fourteenth Amendment. Its decision is summed up in the following language of HOLMES, J. (page 145):

> "The prohibition of a particular kind of "destruction and of acquiring property and "instruments intended for that purpose es- "tablished no inequality. * * * It is to "be remembered that the subject of this whole "discussion is wild game which the state may "preserve for its own citizens if it pleases. "(*Geer v. Connecticut*, 161 U. S., 519, 529.)"

It will thus be seen that no fundamental principle or constitutional provision as to suppression of liberty or affecting private property was involved or invaded.

We have carefully examined the various authorities cited by the learned judge in support of his conclusions and respectfully submit that when the language used is read with reference to the facts of the case in hand, they do not support the conclusions reached by him.

The concurring opinion of BARTLETT, Ch. J. was based upon the statement that the Fourteenth Amendment was not "designed to limit the right of a state to choose its own servants." We admit it was not so designed and assert that it has not such effect as applied to the case in hand. We do not admit, however, that the state may so exercise that right as to infringe the rights of citizens of other states or aliens resident in the State of New York, guaranteed by constitutional provisions or existing treaties. It is not necessary, however, to go to the extent of saying that the state may not even by statute make provision as to who shall be employed in regard to all matters respecting its governmental functions. It would seem to be clear both upon principle and authority, that in regard to all matters in which either the state or a municipality are not exercising sovereign power or rights, it may not wield its power so as to discriminate against citizens of other states or aliens. If it could, it might most effectively by indirection render inoperative every constitutional guaranty or treaty provision intended to secure equal rights to every resident of a state.

In the case of *South Carolina against The United States,* 199 U. S., 437, it was held in substance that there was no constitutional restraint upon a state's engaging in private business but that, if it did so it was no longer acting as a sovereign. The distinction between the rights, powers and liabilities of a state exercising a governmental function and its rights, liabilities and powers when engaged in a private enterprise are clearly indicated.

The court says (page 461):

> "These decisions, while not controlling the question before us, indicate that the thought has been that the exemption of state agencies and instrumentalities from national taxation is limited to those which are of a strictly governmental character, and does *not extend* to those which are used by the state in the carrying on of *an ordinary private business.*
>
> "In this connection may be noticed the well-established distinction between the duties of a public character cast upon municipal corporations and which relate to what may be considered their *private* business, and the different responsibility resulting in case of negligence in respect to the discharge of those duties. The Supreme Court in Massachusetts, speaking by MR. JUSTICE GRAY (afterwards an Associate Justice of this court), in *Oliver v. Worcester* (102 Mass., 489, 499, 500), observed:
>
> " 'The distinction is well established between the responsibility of towns and cities for acts done in their public capacity, in the discharge of *duties imposed upon them* by the legislature for the public benefit, and for acts done in what may be called their private character, in the management of property or rights *voluntarily held by them for their own immediate profit or advantage as a corporation,* although inuring, of course, ultimately to the benefit of the public.

> " 'To render municipal corporations liable to private actions for omission or neglect to perform a corporate duty imposed by general law upon all towns and cities alike, and from the performance of which they derive no compensation or benefit in their corporate capacity, an express statute is doubtless necessary. * * *
>
> " 'But this rule does not exempt towns and cities from the liability to which other corporations are subject, for negligence in managing or dealing with property or rights held by them *for their own advantage or emolument.*" (Italics ours.)

This court then cites many cases illustrating the different rights and duties attaching to a municipality in its capacity as a private corporation, as distinguished from those in its capacity as a governmental agency, among them being:

> *Brown v. Vinalhaven,* 65 Maine, 402;
> *Mead v. City of New Haven,* 40 Connecticut, 72;
> *City of Petersburg v. Applegarth's Administrator,* 28 Gratt., 321, 343;
> *Eastman v. Meredith,* 36 N. H., 285;
> *Western Saving Fund Society v. City of Philadelphia,* 31 Pa. St., 175.

It quotes the opinion in the last mentioned case as follows (page 183):

> "State contracts are not made by the municipal corporation, by virtue of its powers of sovereignty, but in its capacity of a private corporation. The supply of gaslight is no more a duty of a sovereignty than the supply of water. Both these objects may be accomplished through the agency of individuals or private corporations, and in very many instances they are accomplished by those

means. If this power is granted to a borough or a city, it is a special *private franchise*, made as well for the private emolument and advantage of the city as for the public good. The whole investment is the private property of the city, as much so as the lands and houses belonging to it. Blending the two powers in one grant, does not destroy the clear and well-settled distinction, and the process of separation is not rendered impossible by the confusion. In separating them, regard must be had to the object of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character. But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation *quoad hoc* is to be regarded as a private company. *It stands on the same footing as would any individual or body of persons, upon whom the like special franchises had been conferred.*"

In regard to the extent of the power of the state, it is said (page 454):

"Each state is subject only to the limitations prescribed by the constitution and, within its own territory, is otherwise supreme. Its internal affairs are matters of its own discretion. The constitution provides that 'the United States shall guaran-'tee to every state in this Union a republi-'can form of government.' Art. IV, §4. That expresses the *full limit of national control over the internal affairs of a state.*"

This court refers to the fact that in the case of *Vance v. W. A. Vandercook*, No. 1, 170 U. S., 438, it was held that the State of South Carolina had a right to engage in the dispensary business, and says (page 454):

> "The profits from the business in the year 1901, as appears from the findings of fact, were over half a million of dollars. Mingling the thought of profit with the necessity of regulation may induce the state to take possession, in like manner, of tobacco, oleomargarine and all other objects of internal revenue tax. *If one state finds it thus profitable, other states may follow, and the whole body of internal revenue tax be thus stricken down.*" (Italics ours.)

The opinion then calls attention to the growing tendency in favor of the acquisition and management of all public utilities by the state, and proceeds:

> "We may go even a step further. There are some insisting that the state shall become the owner of all property and the manager of all business. * * * If this change should be made in any state, how much would that state contribute to the revenue of the nation?"

If the policy of state ownership of private property or its engaging in business should be adopted and extended, it might take over and operate not only all the railroads in the state but all the mines, farms, and other enterprises of a private nature. Its relation to them if it did so would be the same as it is to the subways in question. It would have the same right to discriminate as against the employment of aliens or citizens of another state that it assumes to exercise in regard to rapid transit. Every other state may adopt the same policy.

It is said (page 455):

> "If all the states should concur in exercising their powers to the full extent, it would be almost impossible for the nation to collect any revenues. In other words, in this

indirect way it would be within the competency of the states to practically destroy the efficiency of the National Government."

Now applying the same principle of reasoning to the claim that the state may employ in all cases whom it likes, the same as an individual, what result may follow?

What then becomes of the constitutional guarantee of the rights of all persons equally to life, liberty and the pursuit of happiness, or equal protection under the laws in their property and personal rights? Or how would it be possible to make effective the provisions in treaties defining and securing rights to citizens of other nations?

Clearly, in this indirect manner all these fundamental principles could be evaded or destroyed.

But there is another fallacy in the claim that because an individual may employ whom he likes without reference to citizenship, the sovereign must possess an equal, if not superior, right. The state is not in the position of an individual, but represents all individuals and municipalities in their collective capacity. Hence its action, through statute, prohibiting the empoyment of aliens and giving preference to its own citizens, in effect, practically commits both the people and the municipalities to a policy prohibited by the constitution.

If it be true that an individual has a right to employ whom he likes, without reference to citizenship, we take it that it is equally true that, if all the individuals engaged in any one line of business, as for instance, farmers—should enter into a compact or agreement binding themselves not to do so, such compact or agreement would be

unenforceable and void as being against public policy. Yet this is in effect what the state does, or attempts to do, by the legislation in question.

The argument, therefore, so much insisted upon as to the validity of such laws based upon the theory that the state may do what the individual can, is readily seen to be unsound, both because of the consequences to which it leads and its failure to recognize that what may be legal on the part of an individual in the exercise of the liberty guaranteed under the constitution, because of its lack of effect on public policy, yet would become wholly illegal, if done in concert with large numbers, and thereby become destructive of public policy.

In *People v. North River Sugar Refining Company,* 121 N. Y., 582, an action instituted by the Attorney-General to dissolve the so-called "sugar trust" which had been formed by a combination of substantially all the sugar refining companies in and near the State of New York, the argument was advanced that the formation of the trust by a corporation was legal because it would have been legal for an individual to have bought up all the sugar refineries to operate them as a single industry, but FINCH, J., tersely disposed of that contention. He says (page 625):

> "It is not a sufficient answer to say that similar results may be lawfully accomplished; that an individual having the necessary wealth might have bought all these refineries, manned them with his own chosen agents, and managed them as a group at his sovereign will; for it is one thing for the state to respect the rights of ownership and protect them out of regard to the business freedom of the citizen, and quite another thing to add to that possibility a further extension of

those consequences by creating artificial persons to aid in producing such aggregations. The individuals are few who hold in possession such enormous wealth, and fewer still who peril it all in a manufacturing enterprise; but if corporations can combine, and mass their forces in a solid trust or partnership, with little added risk to the capital already embarked, without limit to the magnitude of the aggregation, a tempting and easy road is opened to enormous combinations, vastly exceeding in number and in strength and in their power over industry any possibilities of individual ownership; and the *state by the creation of the artificial persons constituting the elements of the combination, and failing to limit and restrain their powers, becomes itself the responsible creator, the voluntary cause of an aggregation of capital which it simply endures in the individual as the product of his free agency. What it may bear is one thing, what it should cause and create is quite another.*"

Furthermore, if the state claims the same rights as an individual, it follows that it is subject to the same limitations imposed upon him.

As was said in *People v. Stevens*, 71 N. Y. 527:

"There is not one law for the sovereign "and another for the subject; but when the "sovereign engages in business and the con- "duct of business enterprises and contracts "with individuals, although an action may not "lie against the sovereign for a breach of the "contract, whenever the contract in any form "comes before the court, the rights and ob- "ligations of the contracting parties must be "adjusted upon the same principles as if "both contracting parties were private per- "sons. Both stand in equality before the law "and the sovereign is merged in the dealer, "contractor and suitor."

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An individual may not make a contract binding himself not to pursue his ordinary calling or trade. Such agreement would be void as against public policy for two reasons: one, the injury to the public by being deprived of his industry; the other, the injury to the individual himself by being prevented from supporting himself and his family.

Gibbs v. Cons. Gas Co. of Baltimore,
130 U. S., 396, 409.

Can the state, therefore, by statute legally take from the individual rights so sacred that he is prevented by public policy from bartering them away himself? Or can it inflict upon the public the injury flowing from loss of service of those whose employment is restricted or taken away by statute, when *public policy* prohibits the individuals themselves from inflicting such an injury upon the public.

Both at common law and under statutes giving expression to the public policy of the state and nation, individuals may not by concert carry out any purpose contrary to public policy or injuriously affecting the rights of others. May the state, wielding under the constitution the power of concerted action of all its people, do so?

Again, we take it, the individual may discriminate among his employees on the ground of either race or religion. Yet it must be conceded that the state cannot. Why? Simply because such discrimination on its part is forbidden by the Fourteenth Amendment.

The concurring opinion of SEABURY, J. (Record, p. 99) is based largely upon the theory that the statute in question can be supported as an exercise of the police power of the state. We respectfully submit that in this the learned judge

is in error. We need but refer to the cases cited upon this point on page 89 of this brief, showing that within the doctrine they establish the police power has and can have no application to the situation in hand. While it is often difficult to define the limits of the police power in their application to a given state of facts, nevertheless certain limits beyond which it may not operate must be perfectly clear. For instance, where a right guaranteed by constitutional provision or existing treaties begins, there the operation of the police power must necessarily cease. The same must be true as regards an exclusive right or power given by the constitution to the Federal Government. Where the necessary effect of the police power as applied by the state is to invade or destroy such rights or powers, its invalidity, we submit, must be entirely clear.

IX.

The judgment of the Court of Appeals should be reversed and the judgment of the Appellate Division reinstated, with costs in all courts.

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Appendix A.

ANCIENT CHARTERS OF THE CITY OF NEW YORK.

The Nicolls Charter (1665) declared that "the inhabitants of New York, New Harlem and all other his Majesty's subjects, inhabitants upon the island, commonly called and known by the name Manhattan Island, are and forever shall be accounted, nominated and established as one body politique and corporate." No specific proprietary right was granted by this charter, but the establishment of the "body corporate" allowed of the acquisition of such proprietary rights.

The Nicolls charter was confirmed by proclamation of Governor Andros after the English regained possession in 1674.

The Dongan Charter (1686) recites in the preamble:

> *Whereas,* the City of New York is an ancient city within the said province, and the said city has anciently been a body politic and corporate, and the citizens of the said city have held, used and enjoyed, as well within the same as elsewhere in said province, divers and sundry rights, liberties, privileges, emoluments, etc., as well by prescription as by charter, letters patent, and grants, and confirmations, not only of divers governors and commanders-in-chief of the Nether Dutch Nation, while the same was under their power and subjection.
>
> "*And whereas,* divers lands, tenements hereditaments, jurisdiction, liberties and privileges have heretofore been given or granted, or intended to be given or granted to the citizens and inhabitants of the said city, sometimes by the name of the Mayor and Aldermen and Sheriff of the City of New York,

and sometimes by the name of the Mayor and Aldermen of the City of New York,—and by divers other names, as by their several letters patent, charters, grants, writings, records and muniments, amongst other things, may more fully appear.

"*And whereas,* the citizens and inhabitants of the said city have erected, built and appropriated, at their own proper costs and charges, several public buildings, accommodations and conveniences for the said city, that is to say, the City Hall or State House, with the ground thereunto belonging; two market-houses; the bridge into the dock; the wharves or docks, with their appurtenances, and the new burial-place without the gate of the city; and have established and settled one ferry from the said City of New York to Long Island, for the accommodation and convenience of passengers, the said citizens and travelers."

By this charter of 1686, all these franchises, privileges and rights theretofore granted or appropriated were fully confirmed and, except for six parcels of land reserved to the Crown, all vacant and unappropriated lands on Manhattan were granted to the corporation.

The Cornbury Charter (1708) granted exclusive ferry privileges and a strip of land on the Brooklyn side of the East River from the Wallabout to Red Hook.

The Montgomery Charter (1732) was granted on petition of the Common Council. The petition recited:

"That the City of New York is an ancient city, and the citizens thereof have anciently held and used, and still do hold and use divers rights, liberties, privileges, franchises, jurisdictions and emoluments, lands, tenements, hereditaments, and public buildings, as well by the name of the Mayor, Aldermen

and Commonalty of the City of New York, as otherwise."

The prayer of the petition was for letters patent

> "Confirming and granting to this city and Corporation, by the name, style and title of Mayor, Aldermen, and Commonalty of the City of New York, all their lands, tenements, public buildings, and hereditaments, wharves, docks, bridges, slips, ferries, cranes, grants, charters, liberties, franchises, free customs, jurisdictions, emoluments and immunities, now and heretofore by them held and enjoyed; *and that for* the greater ease and encouragement of trade, the bounds and limits of this city be enlarged. * * *
>
> "That the Corporation may have the sole power and authority of appointing ferries around this island, with the profits, benefits, and advantages arising therefrom, with such fees as shall be regulated by the act of Assembly.
>
> "That they should have all the market-houses, slips, wharves, docks, cranage and wharfage, and profits which may arise therefrom,"

and for a confirmation and grant of the lands on Nassau Island (Long Island): "the ferry houses and appurtenances thereunto."

The charter when granted was in substantial accord with the prayer of the petition.

By an act of the Colonial Assembly which became a law October 14, 1732, it was declared and enacted:

> "That the Mayor, Aldermen and Commonalty of the City of New York shall and may forever hereafter continue and remain a body

> corporate and politic *in re facto et nomine* by the name of the Mayor, Aldermen and Commonalty of the City of New York";

and that all letters patent, grants, charters and gifts heretofore made and granted,

> "be and are hereby declared to be and shall be good, valid, authentic and effectual in the law against the King's Majesty, his heirs and successors, and all and every person and persons whomsoever, according to the tenor and effect of the said letters patent, grants, charters and gifts";

and that they

> "be and are, to all intents and purposes, hereby ratified and affirmed,"

and that

> "the Mayor, Aldermen and Commonalty of the City of New York shall and may, forever hereafter, peaceably have, hold, use and enjoy all and every the rights, gifts, charters, grants, powers, liberties and hereditaments which have heretofore been given or granted unto the Mayor," etc.

This act of the Colonial Assembly did not have the royal approval, but, as pointed out in *People v. Trinity Church* (22 N. Y., 44), royal approval was not necessary to render a Colonial act effective. Royal disapproval was required to render it ineffective, and no such disapproval was promulgated.

As HOFFMAN points out in *"Estate and Rights of the Corporation of the City of New York as Proprietor"* (Vol. I, pp. 27, et seq.), at the time of the adoption of the Constitution of 1777, the Mayor, Aldermen and Commonalty of the City of New York were and had been for many years a

body politic and corporate and, as a body corporate, was a proprietor of lands and of ferry franchises, which it leased for a term of years.

The Constitution of 1777 provided:

> "That nothing therein contained should annul any charters to bodies politic made prior to the 14th day of October, 1775."

The Constitution of 1821 provides:

> "That nothing therein contained should annul any charters to bodies politic and corporate made prior to the 14th day of October, 1775:"

At the foundation of the State of New York, therefore, the Mayor, Aldermen and Commonalty of the City of New York, either under the various ancient charters themselves or under the act of 1732 of the Colonial Assembly, were endowed with certain proprietary rights which were recognized as being as much beyond the control of the State government as the proprietary rights of any natural person.

The Colonial act of 1732 removed all question as to the form of the grants under the charters, and the objection once raised—that the charters should not have been granted in the name of the different governors, but should have been granted in the name of the King—was removed from consideration.

Ancient Charters of the Town of New Harlem.

In 1666, New Harlem received its first charter from Governor Nicolls. That charter contains the following language:

> "Whereas, there is a certain town or village commonly called and known by the name

> of New Harlem, * * * I do * * confirm and grant unto the freeholders and inhabitants in general, their heirs, successors, and assigns, the privileges of a town, but immediately depending on this city" (the City of New York) "as being within the liberties thereof."

The charter determined the boundaries of the town, names it Lancaster and obligated the freeholders and inhabitants, as a condition under the grant, to establish and maintain a ferry.

In 1667, the same governor, by a new charter changed the name from Lancaster to "New Harlem," included within the limits of the town a large portion of what is now the Borough of the Bronx and provided against the building of any house within two miles of the boundaries of the town, without the consent of the "major part of the inhabitants of said town." This latter provision was deemed necessary on account of the pasturage for cattle enjoyed by the freeholders and inhabitants in the small clearings in the woods.

In 1686, Governor Dongan issued the last charter to New Harlem, which confirmed the existence of the freeholders and inhabitants as a town, the right of the town to establish and maintain a ferry, and the right of the town to the enjoyment of commonage as it existed at that time, but whatever rights had been secured by the City of New York within the limits of the town, "as well as without the limits of the said town of Harlem," were preserved.

Appendix B.

DEBATES ON AND DISCUSSION OF TREATY MAKING POWER, PRIOR TO THE ADOPTION AND RATIFICATION OF THE CONSTITUTION OF THE UNITED STATES.

As BUTLER says (*Treaty-Making Powers*, Vol. I, §194):

> "The records of the Constitutional Convention, and the provisions adopted, and incorporated in the Constitution, conclusively demonstrate, as to the treaty-making power:
>
> "*First*: That the unfortunate condition of the Union when the convention convened was largely due to the fact, that, although the Central Government possessed power to make treaties, it did not possess sufficient power to enforce them, and that the Convention unanimously agreed that it would only be by giving to, or vesting in, the Central Government the most exclusive powers, both as to the making and enforcing of treaties, and also by entirely debarring the States from any participation therein, that the foreign relations of the Union could be preserved, and the nation strengthened in its commercial relations which were then assuming larger proportions every year.
>
> "*Second*: That the treaty-making power was lodged in the Central Government, as a matter of course, and that as to that element there was unanimity in the Convention.
>
> "*Third*: That the States were absolutely prohibited from exercising any treaty-making power or entering into foreign relations of any kind, and that the Convention was also a unit on this point.
>
> "*Fourth*: That the treaty-making power was vested in the Central Government with-

out any limitation whatever, and not only were no limitations suggested, but the wide scope of the power was fully appreciated even to the extent 'of selling the Union.'

"*Fifth*: That the only restraints placed upon the treaty making power were as to the method in which treaties must be made and ratified; and that those restrictions related only to the method of exercising the power, and not to its scope or its supremcy.

"*Sixth*: That the convention was unanimous on the point that all provisions of treaties must be enforced for the sake of the national honor, and that the Central Government must have the power to enforce them, and to such end all treaties, as well as the appropriate legislation to make them effectual, must be superior to the constitutions and laws of the several States, and binding upon all the judges, as was expressed in Article VI of the Constitution."

Immediately after the adoption of the Constitution by the Convention, the treaty-making power became a subject of widespread discussion, and none rendered greater service in molding public opinion to favor the ratification of the Constitution, as adopted, than Hamilton, Madison and Jay.

Dawson's Federalist, Numbers IV, XXII, XXIII, XXXVIII, XLI, XLIV, LXIII, LXVIII, LXXIV, and LXXIX.

As Sir Henry Summer Main says (*Popular Government,* page 202), in speaking of the various essays in the Federalist:

"They show us with much fairness either the route by which the strongest minds among the American statesmen of that period had traveled to the conclusions em-

bodied in the Constitution, or the arguments by which they had become reconciled to them."

A reference to the numbers of the Federalist referred to will show that the leading statesmen of the time, by cogent argument and illustration, pointed out the absolute need of giving to the National Government the exclusive power of making and enforcing treaties.

That the State legislatures when they ratified the Constitution containing such powers, fully understood their extent, and that they were to be exclusive, is also clear.

See

Elliott's Debates, Vol. IV, p. 119;
Butler on Treaty-Making Power, Vol. I, §199, et seq.

Appendix C.

A PARTIAL LIST OF THE TREATIES WHICH HAVE BEEN MADE BY THE UNITED STATES WITH FOREIGN NATIONS SINCE THE ADOPTION OF THE CONSTITUTION AND WHICH CONFER PERSONAL RIGHTS ON SUBJECTS OF FOREIGN NATIONS WITHIN THE UNITED STATES.

Treaty of Commerce and Navigation with Austria-Hungary concluded 1829. Articles I, XI.

Treaty of Commerce and Navigation concluded 1875 with Belgium. Article I.

Treaty of 1846 with Colombia.

Convention of Amity, Commerce and Navigation concluded 1850 with Borneo. Article II.

Treaty of Commerce and Navigation with Bolivia of 1858. Article II.

Treaty of Amity, Commerce and Navigation concluded 1891 with Congo. Articles I, II.

Treaty of Peace, Amity, Commerce and Navigation concluded in 1882 with Corea.

Treaty of Friendship, Commerce and Navigation concluded in 1851 with Costa Rica.

Treaty of 1826 with Denmark. Article II.

Consular Convention with France 1853.

Treaty of Amity, Commerce and Navigation with Great Britain concluded in 1794.

Convention of Commerce and Navigation with Great Britain of 1815.

Convention as to Tenure and Disposition of Real and Personal Property with Great Britain 1899.

Treaty of Commerce and Navigation concluded in 1837 with Greece.

Treaty of Commerce and Navigation concluded in 1846 with Hanover. Article VI.

Treaty of Friendship, Commerce, Navigation and Extradition with Hawaiian Islands 1849. Article VIII.

Treaty of 1911 with Japan.

Treaty of Commerce and Navigation of 1862 with Liberia. Article II.

Treaty of Friendship, Commerce and Navigation of 1867 with Nicaragua. Article IX.

Convention of Friendship and Commerce and Extradition of 1871 with Orange Free State. Article I.

Treaty of Friendship, Commerce and Navigation of 1859 with Paraguay. Article XIV.

Treaty of Friendship and Commerce of 1856 with Persia. Article III.

Convention of Amity, Navigation and Commerce of 1850 with San Salvador. Article III.

Convention of Commerce and Navigation of 1881 with Servia. Articles I and II.

Treaty of Friendship and General Relations of 1902 with Spain. Article II.

Convention of Friendship, Commerce and Extradition of 1850 with Switzerland. Articles I and II.

Convention of Amity, Commerce, Navigation and Extradition of 1855 with Two Sicilies.

Treaty of Amity, Commerce, Navigation and Extradition with Venezuela of 1860. Articles II and III.

[redacted]

October Term, 1913.

No. 325.

WILLIAM E. HEIM, CRANFORD COMPANY and FLINN-O'ROURKE COMPANY, INC.,

Plaintiffs-in-Error,

AGAINST

EDWARD E. McCALL, MILO R. MALTBIE, J. SARGEANT CRAM, GEORGE V. S. WILLIAMS and ROBERT C. WOOD, as Members of and Constituting the Public Service Commission for the First District of the State of New York,

Defendants-in-Error.

References to Various Sections Affecting Eight Tunnels, Submitted as an Additional Appendix to Brief for Plaintiff-in-Error, William E. Heim.

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New York City.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1915.

No. 386.

WILLIAM E. HEIM, CRANFORD COMPANY, and FLINN-O'ROURKE COMPANY, INC.,
Plaintiffs-in-Error,

against

EDWARD E. MCCALL, MILO R. MALTBIE, J. SARGEANT CRAM, GEORGE V. S. WILLIAMS and ROBERT C. WOOD, as Members of and Constituting the Public Service Commission for the First District of the State of New York,
Defendants-in-Error.

Prior to the amendment of the Constitution of the State of New York in the year 1874, legislation designed to secure more efficient rapid transit facilities in the City of New York, consisted in special acts of the Legislature. See

Chapter 489 of the Laws of 1867, incorporating the West Side and Yonkers Railway Company;

Chapter 230 of the Laws of 1868, incorporating the New York City Central Underground Railroad Company;

Chapter 702 of the Laws of 1872, authorizing the New York and Harlem Railroad Company to lay additional tracks in Fourth Avenue (now Park Avenue) north of 42nd Street;

Chapter 885 of the Laws of 1872, incorporating the Gilbert Elevated Railway Company.

The amendment to the State Constitution in 1874 prohibited such special acts.

Chapter 606 of the Laws of 1875, passed in the year after the amendment to the State Constitution, is the first act by which rapid transit was made possible.

It provides, so far as it applies to the City of New York, for the appointment of rapid transit railroad commissioners by the mayor, on the application of "fifty reputable householders and taxpayers" (§1); for the organization of such commissioners within fifteen days after their appointment (§3); for a determination by said Commissioners, within thirty days after their organization, upon the necessity for a steam railway or railways and, if they determine upon their necessity, the fixing and determining of the routes for such railways within sixty days after their organization (§4); for a decision upon the plans of construction of such railways within ninety days after their organization (§5); for the determination, within the same period, of the time within which such railways or portions of the same shall be constructed and ready for operation and the amount of capital stock of a company to be formed by the commissioners for the "purpose "of constructing, maintaining and operating such "railways"; for the issuance and sale of capital stock (§6); for the organization of the company (§8); and, generally, for the construction, maintenance and operation by the company so organ-

ized of the rapid transit routes theretofore fixed and determined upon by the commissioners.

There are no provisions in this act for municipal construction and control.

Chapter 4 of the Laws of 1891, as amended in subsequent years, is the Rapid Transit Act under which the Dual System of rapid transit is being constructed. We here call special attention to the material provisions of this act, as it antedates Section 14 of the Labor Law in question.

As originally adopted in 1891, that act provided for the appointment by the mayor of five residents as "commissioners of rapid transit" and constituted the commissioners so appointed "a board of rapid transit railroad commissioners" (§1). It provided for their organization as a board within thirty days after the passage of the act (§3); for the determination by said Board "whether it is for the interest of the public and "the city in which it is appointed" that a rapid transit railway or railways for the conveyance and transportation of persons and property shall be established therein, and that "upon the re- "quest in writing of the local authorities of any "such city at any time, the said board shall pro- "ceed forthwith to consider and determine the "same questions"; for the determination and establishment of a route or routes and the general plan of construction and operation thereof; for the obtaining of the necessary consents of property owners (§4); for the transmission of the general plan of construction to the common council of the city, a hearing of the common council upon these plans and a final vote by the common council within four weeks after the receipt of the general plans from the Board of Rapid Transit Railroad Commissioners (§5); for the preparation of detailed plans and specifications

after the obtaining of the consent of the common council, as above indicated, and the consent of abutting property owners (§6); for the sale at public auction of the "right, privilege and "franchise to construct, maintain and operate "such railway"; for the supervision by the Board and its engineers of the construction of the road; for the forfeiture and in that event for the resale of the franchise; for the organization of the corporation which is to exercise the same under a certificate of incorporation, the terms of which are to be fixed as a part of the terms of the sale of the franchise (§7); for the resale of the franchise after the expiration of the term; for the organization of a new corporation for the exercise of the franchise after such resale in the same manner as provided for the corporation purchasing the original franchise (§8); for the appropriation by the Board of Estimate and Apportionment, on requisition of the Board of Rapid Transit Railroad Commissioners, of such sums "as may be requisite and necessary to prop- "erly enable it to do and perform or cause to be "done and performed the duties herein pre- "scribed," the appropriation to be "made forth- "with upon presentation of a requisition from "the board of rapid transit railroad commis- "sioners"; for the issue and sale of revenue bonds of the City to raise the amount of the appropriation (§10); for the organization of "a "corporation or corporations to construct and "operate," under articles of association satisfactory to the Board of Rapid Transit Railroad Commissioners; for public subscription to the capital stock of such corporation (§11); for the increase or reduction of its capital stock (§20). This act also grants such corporations very broad powers—the right to take and hold real

estate necessary for the "construction, main-"tenance and accommodation of its railway or "railways", to cross, intersect, join and unite "its railway or railways with any other railway "before constructed," "to enter upon and under-"neath the several streets, avenues, public places "and lands designated by the said board of rapid "transit railroad commissions" and make the necessary excavations, to borrow money and issue and dispose of bonds (§24).

The act of 1891, while constituting a permanent Board to make the necessary grant of the right, privilege and franchise to construct, maintain and operate, did not contain any provision for real municipal control, nor for municipal construction.

In the year 1894, the Legislature, by Chapter 752 of the Laws of that year, substantially amended the Rapid Transit Act of 1891, the most radical changes in the act being those contained in Sections 9, 12 and 13, which provide for a referendum to the qualified electors of the city of the question of municipal construction (§12) and, in the event of a majority vote in favor of municipal construction, for the initiation of such construction by the Board of Rapid Transit Railroad Commissioners within thirty days after the official declaration of such vote and the making and letting of "all contracts required for "the performance of the work necessary to be "done and performed in and about the construction thereof" (§13), and a method in detail of acquiring the necessary real estate. At the general election of 1894, the referendum was had and municipal construction authorized by a majority vote.

The amendments greatly increase the rights and powers of the city to establish the system of rapid transit contemplated by the act of 1891.

Section 9 of said act of 1894 changes the numbers of the former sections numbers 34 to 37 of the Rapid Transit Act to numbers 64 to 67, respectively, and inserts new sections—numbers 34 to 63.

Section 34 thus added, reads as follows:

> "Section 34. In case the people shall determine by vote as hereinafter provided in sections twelve and thirteen of this act that any such railway or railways shall be constructed for and at the expense of such city, then and in that event it shall be the duty of said board to consider the routes, plans and specifications, if any, previously laid out and adopted by them or their predecessors, and for which the consents have been obtained referred to in section five of this act; and either to proceed with the construction of such railway or railways, and provide for the operation of the same, as hereinafter provided, or to change and modify the said routes, plans or specifications in such particulars as to said board may seem to be desirable, or to adopt other or different routes, plans and specifications for such railway or railways, provided, always that in all cases in which any such change or modification shall be of such a character as to require the consents thereto referred to in section five of this act, and in all cases where other or different routes and plans may have been so adopted the said board shall proceed to secure the consents required to be obtained by section five of this act as therein set forth. As soon as such consents, where necessary, shall have been obtained, and the detailed plans and specifications have been prepared as provided in section six of this act, the said board, for and in behalf of said city, shall enter into a contract with any person, firm or corporation, which in the opinion of said board shall be best qualified to fulfill and carry out said contract, for the construction

of such road or roads, upon the routes and in accordance with the plans and specifications so adopted, for such sum or sums of money, to be raised and paid out of the treasury of said city, as hereinafter provided, and on such terms and conditions, not inconsistent with the aforesaid plans and specifications, as said board shall determine to be the best for the public interests. And said board may contract for the construction of the whole road, or all the roads provided for by the aforesaid plans in a single contract, or may by separate contracts, executed from time to time, provide for the construction of parts of said road or roads as the necessities of said city and the increase of its population may in the judgment of said board require. Such contract shall also provide that the person, firm or corporation so contracting to construct said road or roads shall, at his or its own cost and expense, equip, maintain and operate said road or roads for a term of years to be specified in said contract, not less than thirty-five, nor more than fifty years, and upon such terms and conditions as to the rates of fare to be charged and the character of service to be furnished and otherwise as said board shall deem to be best suited to the public interests, and subject to such public supervision and to such conditions, regulations and requirements as may be determined upon by said board. Such contract shall further provide that the person, firm or corporation so contracting to construct, maintain and operate said road shall annually pay into the treasury of said city, as rental for the use of said road, a sum, to be specified in said contract, which shall not be less than the annual interest upon the bonds to be issued by said city for the construction of said road as hereinafter provided for, and a sum, in addition to said interest, not less than one per centum per annum upon the whole amount of said bonds. The aforesaid annual rental shall be

paid at such times during each year as said board shall require and shall be applied first to the payment of the interest on said bonds, as the same shall accrue and fall due, and the remainder of said rental not required for the payment of said interest shall be paid into the sinking fund, for the payment of the city debt, if there shall be such sinking fund in said city, or, if there be none such, then said balance of said rental shall be securely invested, and with the annual accretions of interest thereon, shall constitute a sinking fund for the payment and redemption at maturity of the bonds issued, as hereinafter provided. Said contract may also provide for a renewal or renewals of the lease of said road upon the expiration of the original term and of any renewals of the same upon such terms and conditions as to said board may seem just and proper, and may also contain provisions for the valuation of the whole or a part of the property of said contracting person, firm or corporation, employed in and about the equipment, maintenance and operation of said road, and for the purchase of the same by the city, at such valuation, or a percentage of the same, should said lease not be so renewed at any time. Said contract may provide for the construction of said road in sections, and in all cases shall specify when the construction of said road, or sections of the same shall be commenced, and, in each case, the date of completion. It shall also state the date on which the operation of the road, or any section thereof, shall commence. The person, firm or corporation so contracting for the construction, equipment, maintenance and operation of said road, shall give a bond to said city, in such amount as said board of rapid transit railroad commissioners shall require, and with sureties to be approved by said board, who shall justify in the aggregate in double the amount of said bond. Said bond shall be a continuing security, and shall

provide for the prompt payment by said contracting person, firm or corporation, of the amount of annual rental specified in the aforesaid contract, and also for the faithful performance by said contracting person, firm or corporation, of all the conditions, covenants and requirements specified and provided for in said contract. The said contracting person, firm or corporation shall also, simultaneously with the execution and delivery of said contract, deposit with the comptroller or other chief financial officer of such city the sum of one million dollars as further security for the faithful performance by such contracting person, firm or corporation of all the covenants, conditions and requirements specified and provided for in said contract relating to the construction and equipment of said road, and the city in and for which said road shall be constructed shall also have a first lien upon the rolling stock and other property of said contracting person, firm or corporation, constituting the equipment of said road and used or intended for use in the maintenance and operation of the same, as further security for the faithful performance by such contracting person, firm or corporation of the covenant, conditions and agreements of said contract on his, their or its part to be fulfilled and performed, and in case of the breach of any such covenant, condition and agreement said lien shall be subject to foreclosure by action, at the suit of such city, in the same manner, as far as may be, as is then provided by law in the case of foreclosure by action of mortgages on real estate. The said board of rapid transit railroad commissioners may, however, from time to time, by a concurrent vote of all the members of said board, relieve from such lien, any of the property to which the same may attach, upon receiving additional security which may be deemed by said board so voting to be the equivalent of that which it is proposed to release and

otherwise upon such terms as to such board so voting shall seem just. Upon the completion of the construction and equipment of said road to the satisfaction of said board and when the operation of the same shall have commenced pursuant to said contract it shall be the duty of the comptroller or other chief financial officer to pay to the said contracting person, firm or corporation said sum of one million dollars so to be deposited as above provided, and said contracting person, firm or corporation shall also be then entitled to be credited upon the rental which he, they, or it shall have contracted to pay to said city for the use of said road a sum which shall be equal to the interest on the sum of one million dollars for the time of such deposit at the rate of interest provided for in the bonds which shall have been issued and sold by the city to provide for the construction of said road. The said contract shall further provide that in case of default in paying the annual sum or rental therein provided for, or in case of the failure or neglect on the part of said contracting person, firm or corporation, faithfully to observe, keep and fulfill the conditions, obligations and requirements of said contract, the said city, by its board of rapid transit railroad commissioners, may take possession of said road and the equipment thereof, and as the agent of said contracting person, firm or corporation, either maintain and operate said road, or enter into a contract with some other person, firm or corporation for the maintenance and operation thereof, retaining out of the proceeds of such operation, after the payment of the necessary expenses of operation and maintenance, the annual rental hereinbefore referred to, and paying over the balance, if any, to the person, firm or corporation with whom the first contract above mentioned was made, and if such proceeds of the operation of said road, after the payment of the necessary expenses of mainten-

ance and operation, including the keeping in repair of the rolling stock and other equipment, shall in any year be less than the annual rental hereinbefore referred to and provided in the first contract, then and in that case, the said contracting person, firm or corporation and his or its bondsmen, shall be and continue jointly and severally liable to the aforesaid city for the amount of such deficiency until the end of the full term for which the said first contract was originally made. No contract entered into under authority of this act shall be assigned without the written consent of the said board of rapid transit railroad commissioners concurred in by all the members of said board."

Section 35 provides for the exemption from taxation of property owned by the operating company; Section 36, for advertising before the letting of contracts.

Section 37 provides for an appropriation by the Board of Estimate and Apportionment "for the purpose of providing the necessary means for such construction at the public expense" and for the issue by the comptroller of bonds of the city sufficient in amount to cover such appropriation.

Sections 39 to 62 provide for the acquisition of the necessary real estate and the preparation of necessary maps and plans.

Section 63 provides as follows:

"Sec. 63. In case it shall be determined by vote of the people as provided by section twelve and thirteen of this act (Chapter 752, Laws of 1894), to construct by and at the city's expense, then and in that event the road or roads so constructed shall be and remain the absolute property of the city so constructing it or them, and shall be and be deemed to be a part of the public streets

and highways of said city, to be used and enjoyed by the public upon the payment of such fares and tolls, and subject to such reasonable rules and regulations as may be imposed and provided for by the board of rapid transit railroad commissioners in said city."

No further substantial amendments to the Rapid Transit Act were made until Chapter 472 of the Laws of 1906 was passed, and the principal change made by that law was to provide for municipal operation, by the adding of a new section—34d—

The section so added reads as follows:

"§34d. If in the opinion of the board of estimate and apportionment, or other analogous local authority of such city, either a contract for equipment, maintenance and operation, or a contract for maintenance and operation as provided for in the preceding sections would be inexpedient, impracticable or prejudicial to the public interest, the board of rapid transit railroad commissioners shall forthwith devise and prepare a plan for the maintenance and operation of such road or roads, and when said plan shall have been approved by the board of estimate and apportionment, or other analogous local authority of such city, the said board of rapid transit railroad commissioners shall maintain and operate such road or roads for and on behalf of said city. The rates of fare provided for in any operating contract or plan aforesaid shall be adjusted, fixed and readjusted always with a view to securing sufficient receipts therefrom, when added to the net revenues from such galleries, ways, subways or tunnels, and all other sources incidental or appurtenant to the use and operation of said road or roads, to provide for operating expenses, maintenance, interest on the cost, all other proper charges, and a sinking fund to discharge the bonds issued

for the construction and equipment of such road or roads within a reasonable period, without recourse to taxation. Whenever it shall seem practicable to reduce the rates of fare, the reduction shall in the first instance be in favor of school children, and then, next in order, in favor of all the public between six and nine o'clock ante meridian, and between four and seven o'clock post meridian, and then for all the public from five o'clock ante meridian until seven o'clock post meridian, and, lastly, for all the public at all times. No part of any road or roads or of its or their appurtenances, constructed under the authority of this act, shall be used for advertising purposes, except that the person, firm or corporation operating such road or roads may use the structure for posting necessary information for the public relative to the running of trains and to the operation of the road or roads. Nor shall any trade, traffic or occupation, other than required for the operation of said road or roads, be permitted thereon or in the stations thereof, except such sale of newspapers and periodicals as may from time to time, always within the right of revocation be permitted by the board of rapid transit railroad commissioners."

In 1907, on the recommendation of Governor Hughes, the Public Service Commissions Law was adopted and the Board of Rapid Transit Railroad Commissioners was supplanted by the Public Service Commission.

Under an amendment to the Constitution, which became effective on January 1, 1910, bonds of the city issued for dock and rapid transit purposes were excluded from computation of the debt incurring capacity of the City, in order to enable the City to extend rapid transit facilities.

So far as the questions before the court in the

present case are concerned, the next material changes in the Rapid Transit Act were made by Chapter 226 of the Laws of 1912, when the Legislature expressly authorized the Public Service Commission, acting for and in behalf of the City, to enter into the contracts with the Interborough Rapid Transit Company and the New York Municipal Railway Corporation, which were signed on March 19, 1913, providing for the construction, maintenance and operation of the Dual System as outlined in the complaint and for the recapture of the whole or any portion of that system by the City.

These amendments appear in a printed copy of the Rapid Transit Act, which will be submitted to the court.

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Office Supreme Court, U. S.
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Supreme Court of the United States

OCTOBER TERM, 1915
No. 386

WILLIAM E. HEIM, CRANFORD COMPANY, and FLINN-O'ROURKE COMPANY, INC.,
Plaintiffs in Error,

vs.

EDWARD E. McCALL, MILO R. MALTBIE, J. SERGEANT CRAM, GEORGE V. S. WILLIAMS and ROBERT C. WOOD, as Members of and Constituting the Public Service Commission for the First District of the State of New York,
Defendants in Error.

Brief for Defendants in Error

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

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New York City
Borough of Manhattan

Supreme Court of the United States

WILLIAM E. HEIM, CRANFORD COMPANY and FLINN-O'ROURKE COMPANY, INC., *Plaintiffs in Error* *vs.* EDWARD E. McCALL, MILO R. MALTBIE, J. SERGEANT CRAM, GEORGE V. S WILLIAMS and ROBERT C. WOOD, a members of and constituting th PUBLIC SERVICE COMMISSION FOR THE FIRST DISTRICT OF THE STATE OF NEW YORK, *Defendants in Error.*	October Term 1915. No. 386.

BRIEF FOR DEFENDANTS IN ERROR

Statement

The Federal question here presented is whether Section 14 of the Labor Law of the State of New York (Laws of 1909, Chapter 36, Consolidated Laws Chapter 31) is valid and constitutional. The section reads as follows (Transcript of Record, page 88):

> "Section 14. Preference in employment of persons upon public works. In the construction of public works by the state or a municipality, or by persons contracting with the state or such municipality, only citizens of the United States shall be employed; and in all cases where laborers are employed on any such public works, preference shall

be given citizens of the State of New York. In each contract for the construction of public works a provision shall be inserted, to the effect that, if the provisions of this section are not complied with, the contract shall be void. All boards, officers, agents or employees of cities of the first class of the state, having the power to enter into contracts which provide for the expenditure of public money on public works, shall file in the office of the commissioner of labor the names and addresses of all contractors holding contracts with said cities of the state. Upon the letting of new contracts the names and addresses of such new contractors shall likewise be filed. Upon the demand of the commisisoner of labor a contractor shall furnish a list of the names and addresses of all subcontractors in his employ. Each contractor performing work for any city of the first class shall keep a list of his employees, in which it shall be set forth whether they are naturalized or native born citizens of the United States, together with, in case of naturalization, the date of naturalization and the name of the court where such naturalization was granted. Such lists and records shall be open to the inspection of the commissioner of labor. A violation of this section shall constitute a misdemeanor and shall be punishable by a fine of not less than fifty dollars nor more than five hundred dollars, or by imprisonment for not les sthan thirty nor more than ninety days, or by both such fine and imprisonment."

POINTS

I

It is elementary that a statute should not be declared unconstitutional if by any reasonable construction it may be harmonized with the fundamental law.

II

Section 14 of the Labor Law of the State of New York in providing that only citizens of the United States shall be employed in the construction of public works by the state or a municipality, or by persons contracting with the state or such municipality, does not clearly violate either the Constitution of the State, the Constitution of the United States or treaties with foreign countries.

The broad powers of the state legislature were clearly and comprehensively indicated in the opinion of *Denio,* Ch. J., in *People* v. *Draper,* 15 N. Y., 532, 543:

> * * * the people in framing the constitution committed to the legislature the whole law-making power of the state, which they did not expresly or impliedly withhold. Plenary power in the legislature, for all purposes of civil government, is the rule. A prohibition to exercise a particular power is an exception. In inquiring, therefore, whether a given statute is constitutional, it is for those who question its validity to show that it is forbidden. I do not mean that the power must

> be expressly inhibited, for there are but few positive restraints upon the legislative power contained in the instrument. * * * The frame of the government; the grant of legislative power itself; the organization of the executive authority; the erection of the principal courts of justice, create implied limitations upon the law making authority as strong as though a negative was expressed in each instance; but independently of these restraints, express or implied, every subject within the scope of civil government is liable to be dealt with by the legislature.

In the present case it is not incumbent upon the defendants to point out some provision of the State Constitution expressly authorizing the legislation sought to be annulled. It is rather for the plaintiffs to demonstrate that by some express prohibition of that document or by reason of some clearly implied limitation therein the power of the legislature has been curtailed. But neither in the State nor in the Federal Constitution is there any express prohibition or limitation applicable to the provisions of the Labor Law affecting aliens. And the terms of the treaties with foreign governments relating to the rights of aliens are equally silent on the precise question here presented.

In attacking the validity of the Labor Law as applied to aliens counsel urge that the present statute deprives the alien laborer of *"liberty or property"* without due process of law and thus violates both constitutions and treaties.

It may be conceded that under judicial construction the meaning of the word "liberty" has been so extended since its adoption in our fundamental law that it now implies not merely freedom from personal restraint but also the right to labor. In view of the general provisions of treaties between the United States and foreign countries, and the binding effect of such

treaties upon the several States, it is obvious that any statute of our legislature forbidding the citizens or subjects of all foreign powers or of any foreign power with whom a treaty exists from engaging in labor within the State would be null and void. But the question sharply presented in the present case is whether a state has the right to declare that in the construction of its own public works or the public works of its municipalities only citizens of the United States shall be employed. If the State has not this right it is denied a privilege enjoyed by every citizen and every corporation within its borders—the privilege of selecting employees. If a treaty attempted to deprive a state of its right in this respect it might even be urged that the treaty provision itself was unconsitutional.

It is familiar law that the validity of a statute is not determined by its wisdom. Many foolish acts are passed by legislatures, and many acts whose propriety is questioned by intelligent people, and yet they cannot be successfully assailed. Even statutes making classification are upheld if some basis therefor can be shown, and "the basis is sufficient, even if it seems unreasonable to the courts, provided there is reason enough for it to support an argument so that it could have seemed reasonable to the legislature." (*People ex. rel. W. E. & C. Co.* v. *Metz,* 193 N. Y., 160). Surely it cannot be said that the attempt of the State to prefer citizens to aliens in employment involving the expenditure of public funds is so unreasonable "as to do violence to common sense." On the contrary, the reasons for such legislation are obvious and indicate what may well be deemed a wise public policy. The law does not discriminate against any particular class of aliens or violate the spirit of the "most favored nation" clause. *It is not clearly void.*

The question here discussed was fully considered in the case of *People* v. *Ludington's Sons, Inc.*, 74 Misc., 364, and though the decision sustaining the Labor Law was rendered by a court of limited jurisdiction the opinion was careful and thorough and so far as we are advised was the latest judicial utterance on the subject in the reports of the State prior to the decision of the Court of Appeals now under review.

We need not contend that the provisions of the Labor Law relating to aliens come within the so-called "*police power*" of the State, which, though not specically defined by statute, is generally understood to cover matters affecting public safety, health or morals, and sometimes regarded as including public comfort or convenience. The statute may well be considered as promoting or intended to promote the *welfare* of our citizens, and thereby of the State, and may be defended on that ground. But it seems to come rather within the purview of state *policy* than within the *police* power of the state. Public policy has been defined as

> the general principles by which a government is guided in its management of public affairs, or the legislature in its measures; a term which, as applied to a law, ordinance, or rule of law, denotes its general purpose or tendency considered as directed to the welfare or prosperity of the state or community.
>
> Cyc. vol. 32, p. 1251.

If not strictly a *police* power it is clearly a *reserved* power.

While contending that the state of New York has acted fully within its sovereign powers we do not overlook the fact that if the exercise of state power conflicts with powers of the United States the former must yield. This has been most clearly stated by Chief Justice Marshall in *Gibbons* v. *Ogden*, 9 Wheat, 210, 211:

> The nullity of any act, inconsistent with the constitution, is produced by the declaration, that the constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the State Legislature as do not transcend their powers, but, though enacted in the execution of acknowledged State powers, interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution or some treaty made under the authority of the United States. In every such case, the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.

It is contended that the Labor Law conflicts with that portion of the Fourteenth Amendment of the Constitution of the United States which reads as follows:

> No state shall make or enforce any law which shall abridge the privileges and immunities of the citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

The plaintiffs allege that the Labor Law also conflicts with the provisions of the Constitution of the State of New York, Article I, Section 1, reading as follows:

> No member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof unless by the law of the land or the judgment of his peers,

and with Section 6 of the same Article to the effect that no person shall be deprived of "life, liberty or property without due process of law."

Their theory is that under our statute an alien is deprived of some constitutional right, privilege, or liberty in not being permitted to be employed on the public work of the State or City. We respectfully submit that the following portion of the opinion of Mr. Justice Harlan in *Atkin* v. *Kansas,* 191 U. S., 207, at 223 is pertinent to the present discussion:

> If it be contended to be the right of every one to dispose of his labor upon such terms as he deems best—as undoubtedly it is—and that to make it a criminal offense for a contractor for public work to permit or require his employé to perform labor upon that work in excess of eight hours each day, is in derogation of the liberty both of employés and employer, it is sufficient to answer that *no employé is entitled, of absolute right, and as a part of his liberty, to perform labor for the State;*

If this be the law as to citizens it must apply as well to aliens; and when all aliens are treated alike it cannot be said that they are denied the equal protection of the laws, or the protection of equal laws. As before stated, the Labor Law does not discriminate against any particular class of aliens, nor offend against the "most favored nation" clause found in many treaties. And we think that the cases cited by counsel for plaintiffs in which the Federal courts have held statutes affecting aliens to be violative of treaties, generally will be found to be invalid on the ground that they did not apply equally to all aliens (as *in re Parrott,* 1 Fed. Rep. 481 and *Baker* v. *Portland,* 5 Sawyer 566). In the oft cited case of *Yick Wo* v. *Hopkins,* 118 U. S. 356, the law was intended for application against the Chinese only, and the power committed to the Board of Supervisors was held to be arbitrary, without justifiable reason, and intended to be, and actually, applied with an evil eye and an evil hand.

In writing for the Appellate Division in the present case Mr. Justice Scott refers to the prevailing opinion of the Court of Appeals in *People ex rel. Rodgers* vs. *Coler*, 166 N. Y. 1, and quotes a portion thereof relating to the early policy of our state as to immigration, concluding with these words (Record, p. 78):

> The policy of New York has always been to welcome not only the citizens of our sister states, but emigrants from abroad to equal participation in all the opportunities and advantages of its business life. If the policy indicated in the statute now under consideration had been formulated and carried into operation half a century earlier, it may be that the growth and progress of the State would not be the subject of so much pride or as gratifying to all the people as it is now.

May it not be urged that the legislature of the State in one generation has the same right and duty to embody in a statute the policy of that generation as its predecessors of half a century before? And may it not be urged that our representatives in enacting the provisions of the Labor Law as to aliens were governed by the conviction that the time had come to legislate for the protection of our own citizens in the limited field of public works constructed by the State or its municipalities? If the policy of the State has changed it must be due to changed conditions. The existing conditions of labor at this particular moment offer perhaps the strongest evidence of the wisdom of the legislature in preferring its own citizens to aliens as the beneficiaries of public moneys devoted to public enterprises.

III

The alleged inability of the Contractors to secure a sufficient number of citizen laborers able and willing to do the work required does not excuse a violation of the law.

> If the legislation retards public improvements or increases municipal debts, or does not work well in other respects, there is ample room for public sentiment to act through the chosen representatives of the people.
>
> *People ex rel. W. E. & C. Co.* v. *Metz,* 193 N. Y. 159.

If it can be satisfactorily shown that conditions of labor in this state and country are such that without the help of aliens our public works cannot be constructed, it must be assumed that the legislature will afford appropriate relief either by repealing or by modifying the provisions of the statute.

Since this action was begun, the legislature of the State has actually amended Section 14 of the Labor Law so as to permit the employment of aliens when citizens are not available (Laws of 1915, Chapter 51). As amended the section now provides:

> In the construction of public works by the state or a municipality, or by persons contracting for the state or such municipality, preference shall be given to citizens over aliens. *Aliens may be employed when citizens are not available.*

This amendment was made not because the original provision was deemed *invalid* but because the strict enforcement of the original provision might in some cases interfere with the rapid construction of important public works. In other words, the legislature was

convinced that the later form of the statute was *wiser* than the earlier form. "*Public sentiment*" acted "*through the chosen representatives of the people.*"

IV

The provisions of the Labor Law are applicable to the work of building subways for the Rapid Transit system in the city of New York.

In the main opinion of the Appellate Division reference is made to the question whether the building of city subways comes within the Labor Law at all, the suggestion being that the city is acting in a proprietary and not in a governmental capacity. In the separate opinion the particular question is alone considered and the conclusion is stated as follows (Record, p. 83):

> It seems clear, therefore, that even assuming that the legislature had power to impose such an obligation upon the City of New York by limiting the prohibition to "public works," such limitation did not apply to work of the character described in the complaint in this action, and therefore the provision of this section of the Labor Law did not apply to the City of New York when building a subway or railroad as a business enterprise of the City.

We respectfully submit that the rapid transit subways of the City *are* "public works" because they are permanent improvements for the public benefit.

In *Blank* v. *Kearny*, 44 App. Div., 592, the Court speaking by Mr. Justice Bartlett (now Chief Judge of the Court of Appeals) said (p. 595):

> If the phrase "any public work or improve-

ment'' in this section was intended to comprehend service rendered and supplies furnished in carrying on the ordinary functions of a municipality whenever carried on through the agency of a contract, then the learned judge in Special Term was right in continuing the injunction. In our judgment, however, section 413 of the Greater New York charter relates rather to public works *in the nature of betterments* and does not refer at all to such a matter as public lighting, which must constantly be provided for from day to day and month to month in the administration of the affairs of the city. The section is headed ''Authorizing Public Improvements,'' a title which aptly characterizes its provisions as thus construed, but which would be inaccurate if we adopted the construction put upon the clauses quoted in the court below. Of course there is a sense in which *any service performed for a city*, even the humblest, *may be deemed a public work;* but it seems quite clear to us that only *enterprises in the nature of public improvements* fall within the purview of this section of the charter.

In the present case we are concerned with an ''*enterprise in the nature of public improvements*'' of great magnitude, which required the consent and approval of the local authorities of the city, of property owners and of the courts.

In *State* v. *Butler,* 178 Missouri 272, 317 it was declared that every species and character of work done for the public and for which the taxpaying citizens are liable was to be regarded as public work.

The contribution of the city to the cost of construction of rapid transit railroads is met by bonds of the city and the property of its citizens may be taxed to meet the principal and interest of such bonds. The Rapid Transit Act itself regards the railroads as *improvements* and contemplates the possibility of

charging the cost of construction upon the property benefited (Rapid Transit Act, § 37, 3):

> A rapid transit railroad owned or to be owned by the city, and for the construction of which with public money in whole or in part a contract or contracts have been or are authorized by this act to be entered into as aforesaid, shall be a *local improvement*, the cost of which may be met in whole or in part by assessment on the property benefited.

Indeed, the importance to the public of improved facilities of travel was deemed so vital that the Constitution of the State was amended to meet the exigency, by providing for an exception to the limitation of indebtedness of cities (Article VIII, § 10) so as to eliminate from consideration certain obligations for rapid transit work when earnings from operation should meet the interest and amortization charges.

The supervision of the subway work is committed to the Public Service Commission—a State board. The fact that a *fare* is charged on the railroad does not render the *construction work* private. The City is the *owner* at all times and may, if necessary, operate the road. The City charges for its water, and waterworks are certainly public structures, as distinguished from private plants. The Panama Canal is a great public work notwithstanding the tolls collected from vessels. The City subway rapid transit work already completed and now in progress constitutes one of the greatest public works in the world. In the common acceptation of the words there is not the slightest impropriety in so speaking of the work. Nor are the words "public works" technically defined by the statute under consideration.

But we submit that the question as to the *character* of the subway construction work has been definitely

and finally settled by the decision of the Court of Appeals in the present case. If the point raised by the separate opinion of Mr. Justice Ingraham at the Appellate Division had been sustained in the Court of Appeals the plaintiffs would have prevailed, for the statute is confined to "*public works.*"

The highest court of the State is the final authority for the construction of a state statute. We must now assume that the statute *does* apply to subway construction work in the City of New York, and the Federal question is to be determined upon the construction thus established.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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October, 1915